

757
No. 2143

United States
Circuit Court of Appeals
For the Ninth Circuit.

Transcript of Testimony.
(For Transcript of Record, see Other Volume.)
(IN TWO VOLUMES)

GOLCONDA CATTLE COMPANY, a Corporation,
Appellant,

vs.

THE UNITED STATES OF AMERICA,
Appellee.

VOLUME I.
(Pages 1 to 304, Inclusive.)

Upon Appeal from the United States District Court for the
District of Nevada.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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[Transcript of Testimony, etc.]

*In the District Court of the United States, in and
for the District of Nevada.*

No. 1166.

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

GOLCONDA CATTLE COMPANY, a Corpora-
tion,

Defendant.

[Proceedings Had March 6, 1912, 10 A. M.]

Be it remembered, that this case came on regularly to be heard in the above-entitled court on Wednesday, the 6th day of March, 1912, at 10 o'clock A. M. of said day, before Honorable E. S. FARRINGTON, Judge of said court.

Mr. Samuel Platt, United States Attorney, appearing as attorney for plaintiff, and Mr. William Denman and Mr. Charles R. Lewers appearing as attorneys for defendant.

Whereupon the following proceedings were had, and testimony introduced: [1*]

The COURT.—This is the time set for the case of the United States against the Golconda Cattle Company, No. 1166; are you ready, gentlemen?

Mr. PLATT.—Ready on the part of the Government.

Mr. LEWERS.—If the Court please, we are ready with the exception of the presentation to the Court of a Motion to Amend the Answer, notice of which

*Page-number appearing at foot of page of original certified Record.

has heretofore been given, and which was, by reason of agreement between counsel, continued. We would like to take that up, but suggest that might be taken up after disposing of such matters as counsel for the Government may desire to present in connection with certain witnesses, whom I understand he desires to have excused at this time.

Mr. PLATT.—If your Honor please, concerning the amendment to the answer, probably we can give and take as to that. I have no objection to your Honor allowing or permitting the amendment as suggested by counsel. I think in the exercise of a discretion your Honor might permit such an amendment. And I desire in the same connection to suggest to counsel that upon an examination of the complaint and the answer, I find that these lands have been described in the bill of complaint as lying and being in the County of Humboldt, State of Nevada. The other suit which was instituted alleged that these lands were situated in the County of Humboldt, and I suppose by inadvertence the description was made erroneous in the complaint on file in this action. It should be in the County of Elko. Of course the township and ranges are accurately described, but I desire permission, through the consent of counsel, to amend the bill of complaint to that extent.

Mr. LEWERS.—Do I understand if we consent to that amendment that there will be no objection to the amendment we propose?

Mr. PLATT.—I have no objection, if the Court please. [2]

Mr. LEWERS.—That is agreeable to us.

The COURT.—Both amendments, then, will be allowed.

Mr. LEWERS.—Now, if the Court please, there is another matter that before we can state we are completely ready, I think should be disposed of at this time. In the bill of complaint in paragraph 4, page three, there is contained an allegation. (Reads:)

“Plaintiff alleges that a sufficient affidavit has been heretofore filed with the United States Attorney, for the District of Nevada, by a citizen of the United States, residing therein, that section 1 of Chapter 149, Act of February 25, 1885, United States Statutes at Large, is being violated by the said Golconda Cattle Company, defendant herein.”

In paragraph 4 of our answer, it is alleged: “That defendant is not informed as to the nature or contents of the affidavit, alleged in paragraph 4 of the said bill, to have been filed with the United States Attorney for the District of Nevada by a citizen of the United States residing therein, and therefore is unable to answer as to whether said purported affidavit was or was not a sufficient affidavit as required by the Act of Congress of February 25th, 1885. And this defendant prays that it be permitted to examine the said purported affidavit and that a copy thereof be furnished it.”

The provision of the statute is as follows, section 2 of the Act of February 25th, 1885: (Reads:) “That it shall be the duty of the district attorney of the United States for the proper district, on affidavit filed with him by any citizen of the United States

that section one of this act is being violated showing a description of the land inclosed with reasonable certainty, not necessarily by metes and bounds nor by governmental subdivisions of surveyed lands, but only so that the inclosure [3] may be identified, and the persons guilty of the violation as nearly as may be, and by description, if the name cannot on reasonable inquiry be ascertained, to institute a civil suit."

Now, that is one of the conditions precedent upon which the action is to be brought. It is alleged as a legal conclusion in the complaint that an affidavit was filed. We were unable, as stated in the bill, to answer that, not knowing the contents. We have not been furnished with a copy of this affidavit, or shown the original, although the demand was made in the answer, and a demand has been made a number of times personally upon Mr. Platt since, as the attorney for the Government. At this time, before entering upon the suit, we desire an order that either the original be submitted to us, or that a copy be submitted, so we may know whether or not a condition precedent does exist.

The Government is not entitled by reason of the fact it is the Government, or by reason of the claim of the confidential character of the communication, to prevent us from seeing something which by the statute is made a condition precedent to the bringing of this action, otherwise it would not be necessary ever to comply with the requirements of Section 2 of the Act of 1885, because the defense would have no right to see the affidavit, and therefore, it would

make no difference whether there was an affidavit; and we ask for an order at this time.

Mr. PLATT.—If your Honor please, this is the first time I have ever heard the request made in a court of law that evidence in the possession of the plaintiff, without a bill of discovery, should ever be submitted prior to the trial of the case, to the other side. It is true we have alleged here that [4] this action is founded upon an affidavit filed with the United States Attorney in conformity with the statute as just read to your Honor by counsel. That allegation was made to bring the action within the statute, in so far as a duty prescribed on the part of the United States Attorney may be concerned, and that that duty, and the privilege of bringing the suit, might be clearly expressed in the bill of complaint itself. Now, if the Court please, that is an allegation in the bill, and if it becomes necessary for the Government to establish that allegation by proof, the Government is ready to submit the affidavit in the usual order of proof in support of the allegation of the bill. If your Honor thinks it is proper evidence for us to submit an affidavit in evidence in accordance with the allegation of the bill, we are ready and willing to do that; but we don't think that under the issues joined upon this one allegation, that we should be compelled to submit, in advance of the evidence, this affidavit for the examination of counsel.

Mr. LEWERS.—If the Court please, Mr. Platt entirely misapprehends the purpose of this affidavit, and the purpose of our request.

The COURT.—What have you to say about it being necessary to proceed by a bill of discovery in a case of this sort, in an equity suit?

Mr. LEWERS.—I cannot understand what authority there is for requesting us to file a separate bill of discovery in order to get something, which by the statute is made a condition precedent to the bringing of the action. There is a purpose in requiring this, and that purpose is to prevent prosecutions or suits indicated being brought without sufficient foundation, just as it is provided in the statute that if less than 160 acres is enclosed there must be special authority from the Department of the Interior. [5] Now, under those conditions, where this is a part of his cause of action, we have asked in our answer, which is in the nature of a bill for discovery, we have explained that we could not plead to that portion of the bill because the bill does not set forth what it is, and have asked for a discovery, in the sense that the affidavit, or a copy, be furnished us so that we can plead whether or not there is a sufficient condition precedent to the bringing of the action. It is not that we are asking for it as evidence in the case, but as a condition precedent to the bringing of the action. And I don't think, with all due respect to the Government in this case, that it is a fair proposition to come in here, asking us to plead to a general bald conclusion that there is such an affidavit, when that statute, in terms, provides what that affidavit shall contain as a condition to the bringing of the action. And for that reason, and to determine that question, in order that we may determine whether we are

ready to enter upon a defense, it may be that we shall desire to amend our answer entirely if that affidavit does not conform to the statute.

The COURT.—Well, I don't think I shall make the order at present. It seems to me if the bill was defective, there was another method of raising this point. If you seek to ascertain what the testimony of the plaintiff is to be, and have a right to it, my impression is that it is not a notice to produce the document in a bill of equity, but it is a bill of discovery that entitles you to see that document. I am not perfectly clear about that matter, but I am of the impression that that is the rule, and as to whether that affidavit must be produced before this case is decided or not, I shall not decide that question at the present time. [6]

Mr. LEWERS.—We desire, of course, to be allowed an exception to the ruling of the Court at this time, so far as your Honor has not passed finally upon it. I understand your Honor does not intend at this time to finally pass upon the matter; it may be brought up later without trespassing upon your Honor's ruling.

The COURT.—Yes. I want to say, so far as the admission of testimony is concerned, in cases tried before the Court, it is my purpose to admit nearly all the testimony that is offered in good faith, unless it is clearly irrelevant and immaterial; and if there are any arguments to be made on its admission, I propose to leave those until the final argument. There are too many witnesses being kept here, and I do not care to delay, and usually those questions set-

tle themselves in the course of the trial.

Mr. PLATT.—If your Honor please, there is another matter that I think the record might disclose, by and through the consent of counsel. Your Honor will recall that in open court, I don't remember the exact date, but counsel for the defendant and counsel for the Government were present, and it was suggested by counsel for the defendant, that the Rule to Show Cause, made returnable in this action, whereby the question raised in the bill by way of injunctive relief should be thrashed out and argued before the Court, was, as I understand it, waived by counsel orally, and it was agreed then and there in open court, that the main issues involved in the case should be tried upon the trial of the case, and that no testimony should be taken upon the Rule to Show Cause. I think, if the Court please, in order that the record may stand clear, that the record should show this stipulation in open court by and between counsel for the respective parties, and that they also consent at this time that the Court in its decision upon this matter may decide the case upon the merits, regardless [7] of the fact as to whether the hearing upon the Rule to Show Cause was regularly had or not.

Mr. LEWERS.—My understanding of that is, and I think counsel will agree with me, that it was suggested by me that we hear the question whether they were entitled to a permanent injunction, that is, on the merits. That is all that is involved in this suit; nothing else is involved, and therefore it was not necessary for your Honor to determine when you

came to the trial of the merits, whether a preliminary injunction was necessary. That is all it was. We do not stipulate, and do not want to be understood for one moment agreeing, that there is anything else involved in this suit now, except the right to the injunction.

The COURT.—I don't really see what difference it makes, Mr. Platt. There is no application for any preliminary injunction, or any interlocutory order at the present time; and all you are asking for, as I understand it, is if you prevail, that an injunction be issued.

Mr. PLATT.—That is true, if the Court please, in the main; but your Honor will understand that there was a Rule to Show Cause issued, and it was made returnable upon a certain date. Now, either that Rule to Show Cause was heard, or it wasn't heard, and I desire that the record may clearly show why it was not heard, because it is a link, so to speak, in the chain of the case, which has been omitted and thrown out by stipulation of counsel. Now, counsel's statement that the only relief which we are seeking here is injunctive relief is not in accordance with the prayer of the bill. We are of course seeking a permanent injunction; that is true; but we are also seeking the abatement of the fences; and in addition to that, we are seeking compensatory damages for use of the Government land inclosed. [8]

Mr. LEWERS.—Where is that in the bill?

Mr. PLATT.—I think you will find it in the bill.

The COURT.—It don't seem to me it makes very much difference. If I had refused to give you that

injunction, and you had applied for it, and argued it, and produced your testimony, I would not be bound by that on the final decision. If on the testimony here it appears you are entitled to that injunctive relief, you are entitled to it, and must have it, notwithstanding the fact that the Court refused to give it to you heretofore. Of course, if you wish to make a statement and have it go in the record, that there was no hearing and the reason why no hearing was given, you can do so if you like, but it will not influence the Court in any manner in deciding the merits of this case.

Mr. PLATT.—I desire to state to your Honor that your Honor's statement as to the view of the law upon the matter is amply satisfactory to me. I did not desire to lose any point upon the proposition that the Rule to Show Cause was not heard; and if your Honor feels that the Government by not stipulating in open court or getting a straight up order upon the point, is entitled to go ahead upon the understanding, I have no objection. If your Honor is of that opinion, it is really the only ruling I desire in the matter.

The COURT.—I don't think there is any question on that, if I granted you an injunction, and on the final hearing the testimony convinced me that the order had been issued improvidently.

Mr. PLATT.—The suggestion was merely made by way of caution, if the Court please. Does your Honor desire the pleadings in the case read?

Mr. DENMAN.—I was going to suggest we want to take exception to one statement made by coun-

sel for the Government, concerning [9] the issues involved here. There is no allegation in the complaint of any damages, or any ad damnum clause. There is no common-law right of action set up by injury for the trespass. There is a prayer for an accounting, and I take it it is elementary, that a trespass by wandering animals, or otherwise, is not the subject for an accounting; so the Court has nothing before it in the way of a demand for damages, as in a common-law proceeding.

The COURT.—I do not think it is necessary, Mr. Platt, to read the pleadings. You can simply make a statement of the case, if you wish.

(The United States Attorney makes a statement of the case, and of the allegations of the bill.)

Mr. LEWERS.—We take it that your Honor has read the pleadings, so it will not be necessary for us to read the answer.

The COURT.—You may proceed, Mr. Platt.

Mr. PLATT.—Call Mr. Flocker.

Mr. LEWERS.—If the Court please, at this time we desire all of the witnesses in this case to be placed under the rule.

The COURT.—Very well, you may call the names of the witnesses.

(The names of the witnesses are called by counsel for plaintiff and defendant, respectively.)

Mr. PLATT.—I desire at this time, if the Court please, to make the objection that there is nothing in the law which authorizes the Court in an equity case to exclude the witnesses from the courtroom.

Mr. LEWERS.—The Court has the inherent

power to do that in any case.

The COURT.—I think it is a matter of discretion with the Court. [10]

Mr. PLATT.—Your Honor will give me the benefit of an exception to your Honor's ruling.

The COURT.—Certainly. You may swear the witnesses.

(The witnesses are sworn, instructed by the Court, and placed under the rule.)

Mr. PLATT.—If your Honor please, Mr. Cullom is an official of the Interior Department, and I desire him present in the courtroom.

Mr. LEWERS.—Well, that is true of several witnesses here, at least five, and witnesses whom the Government will depend very largely upon for testimony, as we understand it.

The COURT.—(After discussion by counsel.) I think we will get along better perhaps if each of you has the benefit of the counsel and assistance of one person in the courtroom, and I will make the order allowing each of you to name one that you desire, but the one that is named will be the only one that will be permitted to remain in the courtroom during the course of the trial, unless there is some further order made.

Mr. LEWERS.—We will name Mr. R. E. Tilden.

Mr. PLATT.—I will ask for Mr. Flocker, if the Court please. [11]

[**Testimony of Ira M. Flocker, for the Plaintiff.**]

IRA M. FLOCKER, called as a witness by plaintiff, having been sworn, testified as follows:

Direct Examination.

(By Mr. PLATT.)

Q. State your full name. A. Ira M. Flocker.

Q. Where do you live?

A. 512 Custom-house, San Francisco.

Q. What is your occupation, business, or profession? A. Special Agent General Land Office.

Q. United States Government? A. Yes, sir.

Q. How long have you been a Special Agent of the General Land Office? A. Since June 19th, 1908.

Q. And you have worked continuously in that capacity since that date? A. Yes, sir.

Q. What was your occupation prior to that time?

A. I was assistant topographer in the United States Geological Survey.

Q. How long did you act in that capacity?

A. May 5th, 1905, to June 19th, 1908, with the exception of three months.

Q. What are your general duties as special agent for the Interior Department or the General Land Office of the Interior Department?

A. To protect public lands from illegal use, and prevent depredations on the public lands, and collecting the indemnity for swamp lands.

Q. Are you acquainted, Mr. Flocker, with what is commonly known as the so-called Squaw Valley Ranch, purporting to belong to the Golconda Cattle Company, which said ranch is situated in the County

(Testimony of Ira M. Flocker.)

of Elko, State and district of Nevada?

A. I am acquainted—

Q. Just a moment. [12]

The COURT.—Is not that Squaw Valley Ranch in both counties?

Mr. LEWERS.—No, it is entirely in Elko.

The COURT.—The Squaw Valley Ranch is entirely in Elko?

Mr. LEWERS.—Yes.

Mr. PLATT.—(Contg.) Purporting to be in township 39 north, range 47 east, and township 40 north, range 48 east, and in adjacent townships and ranges. I make the question general in order that it may be sufficiently comprehensive.

A. Yes, sir. But my knowledge is not very minute in respect to the ranch to the westerly of those townships.

Q. Did you have occasion at any time to visit what is commonly known as the Squaw Valley inclosure of the Golconda Cattle Company? A. I did.

Q. When did you make your first visit?

A. In September 7th, 8th and 9th, 1910.

Q. Who, if anyone, accompanied you upon that visit?

A. Harry W. Gray, at that time field assistant of the General Land Office, and R. F. Haws of Elko.

Q. And in what capacity did you make the visit?

A. In my official capacity to locate approximately the fence lines, in order to determine whether or not there was any vacant Government land inclosed by said fence lines.

(Testimony of Ira M. Flocker.)

Q. Did you locate the fence lines of the so-called Golconda Cattle Company Squaw Valley inclosure?

A. I did, approximately.

Mr. DENMAN.—I object to the use of the word “inclosure,” presuming that there was an inclosure there.

Mr. PLATT.—If the Court please, I use the explanatory term “so-called” for the purpose of facilitating the examination. [13]

The COURT.—Proceed.

Mr. PLATT.—(Q.) How many days did you spend in the examination of the fence line of that inclosure? A. Three days.

Q. And state whether or not these two parties about whom you testified, accompanied you upon the three days’ examination? A. They did.

Q. After making that examination, did you prepare a plat, purporting to represent the line, the fence line, which you examined, and about which you have just testified? A. Yes, sir.

Q. I call your attention, Mr. Flocker, to a plat upon the blackboard, and I will ask you whether that is the plat you prepared? A. Yes, sir.

Mr. DENMAN.—Pardon me a moment. Are you referring to the first or second visit?

Mr. PLATT.—The first visit, the September visit.

Mr. DENMAN.—This is the plat for the September visit?

Mr. PLATT.—Well, I think, if the Court please, if counsel will indulge me, I will reach the point that he has in mind.

(Testimony of Ira M. Flocker.)

Q. Now, Mr. Flocker, did you ever again make a visit to the lands described upon that plat?

A. Yes, sir.

Q. Or the fence line described upon the plat?

A. Yes, sir.

Q. When did you make that visit?

A. April 10th and 11th, 1911.

Q. Were you alone? A. No, sir.

Q. Who accompanied you?

A. Fred Backus of Golconda.

Q. How many days did you spend upon that visit?

A. Two days.

Q. Did you ever again visit the so-called inclosure?

A. Yes, sir.

Q. When did you make that visit?

A. July 22d and 23d, 1911.

Q. Were you alone? A. No, sir. [14]

Q. Who accompanied you?

A. James W. Melrose, special agent of the Department of Justice, and Harry Petrie of the Golconda Cattle Company.

Q. How long did you spend upon that third visit?

A. Two days.

Q. This map which you testified you prepared, Mr. Flocker, if counsel will permit a leading question, embraces the result of the three visits which you made to that property? A. Yes, sir.

Mr. PLATT.—There will be no objection to that, I take it?

Mr. DENMAN.—The objection I have, that the word "embraces" does not clearly indicate anything.

(Testimony of Ira M. Flocker.)

What do you mean by "embraces," Mr. Platt?

The COURT.—Well, I think I understand it. If you are going to do that, gentlemen, this case is going to take too long.

Mr. DENMAN.—I don't think it is going to take very long. There will be a large amount we will admit.

The COURT.—I understand that this embraces the result of his work. The facts that he discovered on those three visits are on this map, so far as the map is capable of showing.

Mr. PLATT.—That was the intention of the question, if the Court please.

Mr. DENMAN.—I don't think Mr. Flocker meant to say that.

Mr. PLATT.—(Q.) As I understand, Mr. Flocker, this map embodies a representation by plat tracing and drawing, of the result of the three visits which you made to the ranch, and about which you have just testified?

Mr. LEWERS.—I would suggest that the witness be asked what the map does represent, rather than counsel testifying to what it is. We will get along much more rapidly.

Mr. PLATT.—I knew the question was leading, but I did it to save time. [15]

The COURT.—I will allow that question.

A. Yes, sir.

Mr. PLATT.—(Q.) Now, I wish, Mr. Flocker, you would explain in detail that map, and I think probably you had better step from the witness-stand, with

(Testimony of Ira M. Flocker.)

the Court's permission, and indicate with your lead pencil, or pointer. (Witness goes to map.)

A. This blue line drawn free hand, represents Rock Creek, as shown in the official plats of the United States Land Office. This line in blue, drawn free hand, Willow Creek.

Q. Running along the southern border of the plat?

A. Yes. Ivanhoe Creek comes in at this point, about the center of section 2, township 38 north, range 47 east.

Q. And is so designated upon the plat as "Ivanhoe Creek"?

A. Hot Creek, as shown on the official plats, runs into Willow Creek at a point near the center of section 35, township 39 north, range 48 east. The black outside line on the plat represents the approximate position of the fencing at the time of my first examination, or on September 9th, 1910. Those portions of the fence line marked with the small line on one side, show gaps, where the fence had been taken away at the time of my first investigation, approximately through the east half of section 36, of township 39 north, range 48 east, and through section 31 of township 39 north, range 49 east. Also another gap which is indicated by the same symbol, extended from a point about $\frac{1}{4}$ of a mile south of the quarter *quarter* between sections 17 and 20, township 39 north, range 49 east, to a place where the fence had formerly joined Nelson's fence, indicated upon the plat as such, in section 9 of the same township.

Q. And is Nelson's fence incidated upon the plat as such?

(Testimony of Ira M. Flocker.)

A. Nelson's fence is indicated upon the plat as such. The red [16] lines indicate fencing subsequently constructed, or constructed after my first visit.

Q. Upon what visit did you discover the fences erected, which are delineated upon the map in the red?

A. On my visit of April 10th and 11th, 1911, I found a new fence had been constructed, beginning at about the quarter corner of section 32, township 39 north, range 47 east, one-half mile, south one mile and east about two miles, joining the fencing south of Willow Creek, near the mouth of Ivanhoe Creek, section 2, township 38 north, range 47 east. Also that new fencing had been constructed from a point about one quarter of a mile north of the quarter corner between sections 28 and 33, township 39 north, range 48 east; thence a little north of east for about a half a mile, and thence close along the reservoir of the Golconda Cattle Company; and thence eastwardly for about four miles, where it turned in about the center of section 31, township 39 north, range 49 east, and extended north to Willow Creek, where it stopped.

Q. What is the scale of that map, Mr. Flocker?

A. The scale is two inches to the mile.

Q. Now, how much of the gap, beginning at the lower portion of section 36, and extending in an easterly direction therefrom, was closed up by the fence depicted in the red, and which you discovered had been erected upon your second visit?

A. The gap referred to by the United States At-

(Testimony of Ira M. Flocker.)

torney was about a mile and a half in length. The new fencing closed that gap, all with the exception of about a half a mile; the—

Mr. DENMAN.—I should like to have a question as to what the witness is going to state.

Mr. PLATT.—I submit I asked the question, to describe the lines upon the map, or asked him generally that, and I interrupted [17] him to propound this question as we went along, in order that the Court might be advised as to the point about which I interrogated the witness.

Mr. DENMAN.—What is the question now?

The COURT.—You may proceed in explanation of the map.

A. The red lines indicated, extending from a point about one-quarter of a mile south of the quarter corner between sections 17 and 20, township 39 north, range 49 east, and extending north about $\frac{1}{8}$ of a mile, thence east about, almost a quarter of a mile, and thence along the stream, just a small stream running into Willow Creek, the main stream, which enters the main stream at a point in section 29, about a mile and a half south; thence running north about a mile, and thence a little east of north for about a half a mile further, as indicated on the map, represents fencing which was built subsequent to my examination in April, but prior to my examination in July, 1911, closing up one of the original gaps mentioned, with the exception of about 300 feet.

The COURT.—(Q.) What was the original length of that gap?

(Testimony of Ira M. Flocker.)

A. The original length of that gap is about two miles.

Mr. PLATT.—(Q.) Now, Mr. Flocker, I call your attention to a designation upon the map, beginning approximately at the western side of the plat, and shown as "Opening No. 1," "Opening No. 3," "Opening No. 4," "*Opening*," "Opening No. 5," "Opening No. 6 $\frac{1}{4}$ mile," "Opening No. 7," and "Opening No. 8," and will ask you if those designations correctly represent what actually appeared upon the fences at any one of your examinations?

A. They approximately represent what appeared on July 22d, 1911.

Q. As I understand it, then, you discovered these openings upon your third visit in July, 1911, is that true?

A. Yes, sir. With the exception of the one designated as "Opening No. 1," which [18] was an opening about 150 feet wide, where the road from Tuscaroro to Elko entered the inclosure.

Q. Is that road depicted on the plat?

A. Yes, sir.

Q. How is it represented?

A. A dotted line in an approximate position.

Q. Running approximately in an easterly direction? A. Yes, sir.

Q. State whether or not these openings to which I have just called your attention, were in fact in the fences upon your first two visits.

A. No, sir; with the exception of "Opening No. 4," which is a gate, which was a gate at the time of

(Testimony of Ira M. Flocker.)

my first visit, but at the time of my last visit, I believe Mr. Petrie and Mr. Melrose made it a little wider.

Q. Of course, all I care about is positive testimony, and not questions of speculation.

The COURT.—(Q.) At your first visit, as I understand it, there was only one opening, and that was a gate?

A. Oh, no, sir; quite a number of gates.

Q. Let me understand that answer. Were there any openings then in the fence on your first two visits? A. Yes, sir.

Q. Where gates were not used. Were there any openings at those visits when gates were not used?

A. Yes, sir.

Q. Which ones were they, and what were they?

A. There was an opening between what is designated here by—

Q. Just give the number, if it is numbered.

A. It is not numbered. It is just shown "Opening" between a natural barrier, near the top of what is known as Tojam Mountain and a fence which had been constructed by Mr. North, that is, before that time, and also at the southeasterly end of said natural barrier and at this point this symbol shows the land as being very steep. [19] I would not say it was a good barrier; and at this point the natural barrier began again, and ran into section 9—

Mr. LEWERS.—To which we object, if the Court please, on the ground that the bill alleges there was a fence constructed there and the natural barrier there

(Testimony of Ira M. Flocker.)

is confined to a point above that.

Mr. PLATT.—I understood the answer to be in response to a question of the Court concerning certain openings.

Mr. LEWERS.—We desire to apply the rule when they allege an inclosure consisting of an artificial fence; they shall be confined to proof of that; that is all we came here prepared to meet.

Mr. PLATT.—We are not insisting on testimony as to the barriers; it was not in response to our question.

The COURT.—All right; you need not describe it.

Mr. PLATT.—(Q.) As I understand, at the time of your first and second visits all of these openings designated in the red by the word "Opening" and numbers appearing thereafter, namely, *opening*, Opening No. 4, No. 3, No. 1, No. 8, No. 7, No. 6, Opening *No.*, and Opening No. 5, were not discovered by you until your third visit?

A. Yes, sir.

Q. Is that true? A. Yes, sir.

Q. And, as I understand it, upon your first two visits, these openings as I have designated them, were not in fact within or upon, or connected with the fences. A. No, sir.

Q. Now, state whether or not there were any gates in this fence discovered by you upon any one of your three visits.

A. At the time of my first visit there was a gate about a quarter of a mile south of the center of section 29 of township 39 north, range 49 east; there was a gate—

(Testimony of Ira M. Flocker.)

Q. Now, what kind of a gate was that?

A. My recollection was that it was nothing but wires, with a post attached, so that [20] the post could be bound to another post on the other side of the road.

Q. When the gate was open, state, as nearly as you can, how big an aperture it made in the fence.

A. Perhaps 30 feet.

Q. Now, were there any other gates?

A. There was a gate about a quarter of a mile west of the center of section 32, township 40 north, range 48 east.

Q. And what kind of a gate was that, if you remember?

A. I think that gate was lying down; I don't think it was closed, it was of wire.

Q. Do you remember how big the aperture was?

A. The aperture was about 30 feet.

Q. Were there any other gates that you discovered?

A. There was a gate at approximately the quarter corner between sections 32 and 33, township 39 north, range 47 east; there was an opening there where a gate had been; that is where the Tuscarora and Gold Circle road emerges.

Q. How wide, if you remember, is that aperture?

A. That aperture is about 150 feet wide.

Q. Are there any other gates?

A. There is a gate—

Mr. LEWERS.—There is no testimony there was any gate there, as I understand it?

(Testimony of Ira M. Flocker.)

Mr. DENMAN.—The testimony was, where there had been.

Mr. PLATT.—Well, it was an inadvertent answer. I asked the witness how wide the aperture was, and the witness testified he didn't think there was a gate, if there was it was down.

WITNESS.—There was no gate at that time.

Mr. DENMAN.—That is, at number one?

Mr. PLATT.—At the point designated as the "Road," as I understand it. A. Yes. [21]

Q. Now, were there any other gates?

A. There was a gate approximately a quarter of a mile east of the quarter corner between sections 7 and 8, township 38 north, range 47 east; that was also a wire gate such as I have described before.

Q. About how wide was the aperture?

A. About 30 feet.

Q. Are there any other gates?

A. There were no other gates at the time of my first visit.

Q. Those, as I understand it, were the gates which you discovered upon your first visit? A. Yes, sir.

Q. Upon your second visit, which as I understand it, was some time in April, 1911? A. Yes, sir.

Q. Did you discover any other gates or any changes in the gates?

A. My examination in April was not very complete; I simply went in there to see if I could discover in a general way, whether changes had been made in the fencing, and I discovered the change referred to before in my testimony, that has been made near the

(Testimony of Ira M. Flocker.)

reservoir on Willow Creek.

Q. That is, you discovered the changes as indicated on the map by the red lines? A. By the red lines.

Q. Closing up the gaps?

A. Almost closing one of the gaps mentioned. The county road had been thrown outside the fence line, down to a point approximately a quarter of a mile north of that corner common to 33, 34, 28 and 27, township 40 north, range 47 east; at a point on the east line of section 28, and near the corner, common corner just referred to, there was an opening about 100 feet wide, where it extended, the new fence line, in toward the stream for perhaps maybe a mile, I would judge.

Q. And upon what visit did you discover that?

A. Upon my second visit.

Q. And that is indicated upon the plat in the red?
[22]

A. I have not indicated it there, no.

Mr. DENMAN.—Just get the red ink, and let us have that on.

Mr. LEWERS.—(Q.) As I understand, there was no gate there? A. There was no gate there.

Q. A lane?

A. At the time of my second visit there was a gate there; at the time of my third visit there was no gate there.

Q. You mean in April there was a gate there?

A. April 10 and 11, my impression is there was a gate there at that time, but in July there was no gate.

Mr. PLATT.—(Q.) Well, designate upon the

(Testimony of Ira M. Flocker.)

map just where that gate was.

A. The point I have just described would be on the northern line between 28 and 27, and at a point a little north of the quarter corner I have described.

Q. And how big an aperture did that gate make?

A. My present impression is that the gate was about 30 feet wide, but that thereafter they widened the opening to about 100 feet, and made the lane.

Q. When did you discover that the opening had been widened? A. July 22d and 23d, 1911.

Q. Upon your third visit? A. Yes, sir.

Q. You may sketch in, if you please, Mr. Flocker, upon the plat, that gate.

Mr. LEWERS.—Before he does that I want to ask a question. (Q.) At the time you made your second visit in April, was that gate across the road, or was it not a gate that led into the field where the reservoir is at the end of the lane in which the public road ran?

A. My impression is that the lane, that the gate was the one which the road went through, running from Midas to Tuscarora; that the fence forming the easterly side of that lane was extended across the stream, and then back on the other side of the reservoir, while the one on the westerly side was just a [23] small short fence.

Mr. DENMAN.—(Q.) Was there an opening from the westerly of that place, a gap in the fence of about 100 feet?

A. That is, the lane itself was about 100 feet wide; it was a short lane which was constructed;

(Testimony of Ira M. Flocker.)

it was about 100 feet wide.

Mr. LEWERS.—(Q.) Is it not a fact that at that time the public road which you have described as going outside of the fence, led through an open lane, and that the gate you refer to, was a gate turning to the side into a field?

A. I don't know what you mean by an open lane; the road was simply outside the fence, along through the sagebrush.

Mr. LEWERS.—Pardon the interruption; I wanted to ask a question before the map was marked.

(Witness marks point on map.)

Mr. PLATT.—I wish you would write upon the plat, so it may be properly designated in the notes, the word "Gate," where you have just indicated it upon the plat.

(Witness marks on plat.)

Q. Now, what have you designated that upon the plat? A. "Gate on April 11, 1911."

Q. Mr. Flocker, have you calculated the entire length and extent of the fence as indicated upon the plat?

A. Yes, but I have forgotten now what it was.

Q. Well, I wish you would make the calculation again, in order that I might ask you the question again. I am doing that for the benefit of the Court; just an approximate estimate, that is all I care for.

A. About 44 miles.

Q. About how many? A. Forty-four miles.

Q. Now, Mr. Flocker, I wish you would estimate

(Testimony of Ira M. Flocker.)

approximately, the linear distance of the fence from a point indicated as the intersection of North's fence with the so-called fence of the [24] Golconda Cattle Company, around to a point indicated upon the plat as "Opening No. 6 $\frac{1}{4}$ mile."

A. About 30 miles.

Q. About 30 miles? A. Yes.

Q. And that estimate was made in response to the question which I just asked you, contemplating that the fence was running in a westerly, southwesterly and easterly direction? A. Yes, sir.

Q. From the point of intersection mentioned in the first question? A. Yes, sir.

Q. Now, at the time of your first and second visits, state whether or not you discovered any openings or apertures in the 30 miles of fence about which you have just testified, except the gates indicated upon the plat with a black line. A. No, sir.

Mr. LEWERS.—(Q.) Do I understand that you mean at that time this was closed? A. No, sir.

Mr. PLATT.—You had better designate what "this" is.

Mr. DENMAN.—Opening No. 1.

A. No, sir, at the time of my first visit, September 10th, there was an opening there at the point mentioned by counsel, where the public road entered the inclosure.

Mr. DENMAN.—One hundred feet?

A. About 100 feet.

Mr. PLATT.—(Q.) Then, as I understand it, the gates indicated upon the plat in the black, together

(Testimony of Ira M. Flocker.)

with the opening indicated upon the map as "Opening No. 1," were the only openings or apertures which you discovered upon your first and second visits? A. Yes.

Q. In the 30 miles of fence about which you have just testified?

A. Not the second visit, because there was a new gate in the newly constructed fence, which was there during my second visit.

Q. Now, upon the second visit you testified that you found a newly constructed fence, beginning westerly of the so-called reservoir [25] and southerly from Willow Creek. Now, I wish you would estimate approximately the length of that new fence indicated upon the plat as I have shown, and represented to be in the red.

A. About 4 miles and a half.

Q. About 4 miles and a half? A. Yes, sir.

Q. Now, Mr. Flocker, I wish you would estimate the combined measurements of the openings in the entire fence, which you discovered upon your second visit, and before your third visit.

Mr. DENMAN.—We object to that. This will be a matter for argument later on, your Honor. We object to that upon the ground this is a proceeding to procure a mandatory injunction to abate a nuisance; that the only thing the Court is concerned with is the present condition of the fence, and what may have transpired in the past has nothing to do with this Court sitting as a Court of equity. The past history, as I take it, has nothing to do with the

(Testimony of Ira M. Flocker.)

fence that the Court is to operate on, and to afford the only relief that it can afford under the bill.

The COURT.—I will allow the question subject to your objection.

Mr. LEWERS.—I desire to add the further objection, at any rate the Court could not go beyond the time when the bill was filed, on May 31st, 1911.

Mr. PLATT.—I submit that these two first visits were testified to as having been made prior to the filing of the bill.

The COURT.—Well, the question will be allowed subject to the objection.

Mr. DENMAN.—We note an exception.

WITNESS.—You wish the approximate total distance of openings?

Mr. PLATT.—Yes, which were there and you discovered upon your second visit. A. Second visit?

Q. Yes.

A. The total, about 5 miles and a half. [26]

Q. It would total about 5 miles and a half?

A. Yes, sir.

Q. Now, that 5 miles and a half is, as I understand it, the aggregate distance of openings in the entire 40 miles of fence, or 40 odd miles of fence?

A. Yes, sir.

Mr. DENMAN.—Thirty.

Mr. PLATT.—No, as I understand his testimony, he testified that the entire length of fence was something over 40 miles. A. 44 miles.

The COURT.—Forty-four miles is what he said.

Mr. PLATT.—(Q.) I will ask you this question,

(Testimony of Ira M. Flocker.)

Mr. Flocker: State the aggregate distance of openings in the fence which you found upon your second visit in that portion of the fence designated on the map, and at a point known as the intersection of North's fence with the Golconda Cattle Company fence, running in a southwesterly and an easterly direction, up to a point designated as "Opening No. 6¼ mile," and representing, I understand from your testimony, about 30 miles of fence.

Mr. DENMAN.—In order that your Honor will see what we will later argue on, we object to this on the ground that the fence last described does not on the face of it constitute an inclosure, therefore the question is incompetent, irrelevant and immaterial; that the bill sets forth an inclosure, and this portion described last by counsel, and referring to the second visit of Mr. Flocker, does not constitute on its face an inclosure.

The COURT.—The question may be answered subject to objection.

Mr. DENMAN.—We note an exception.

Mr. PLATT.—Of course I am not pretending to argue these objections.

The COURT.—No, I don't care to listen to that. Of course I will say very frankly, it seems to me that the only condition I [27] can consider is the condition at the time the suit was brought. If there was no fence there a year before, that is immaterial; if it was all fenced a year before, it is immaterial; but if it was all fenced at the time this suit was brought, it is a very serious consideration, and it is

(Testimony of Ira M. Flocker.)

the only consideration for the Court. But I will allow you to ask these questions, anything that you believe is material, I propose to allow you to go into for the present.

Mr. PLATT.—(Q.) Do you recall the question, Mr. Flocker?

A. Yes, sir. With the exception of two gates about 30 feet in width, there was an opening of about 150 feet, I think. I said 100 feet before, but it is marked 150 feet on the map in red, where the road went through.

The COURT.—Read the question.

(The reporter reads the question.)

The COURT.—(Q.) In those 30 miles of fence there were only three openings, do I understand—two gates?

A. There were two gates, and an opening where the road from Tuscarora to Midas went through, it is about 150 feet wide.

Mr. PLATT.—(Q.) What is the entire distance, or aggregate distance of openings in the fence, in that portion of the fence about which I have just interrogated you?

Mr. DENMAN.—We make the same objection to this question we made to the former one.

The COURT.—It will be the same ruling.

Mr. LEWERS.—We desire an exception.

(The reporter reads the question.)

Mr. DENMAN.—I would like to offer the further objection that the complaint does not claim there was an obstruction, it is simply relying on the inclosure

(Testimony of Ira M. Flocker.)

clause of the statute. [28]

Mr. PLATT.—If the Court please, I do not understand that objection. The question did not refer to any obstruction, as I understand it.

Mr. DENMAN.—Very well, if that is the question.

Mr. PLATT.—The question was directed to the openings—

The COURT.—I will allow the question, and we will wait until the argument ceases. You are showing the facts, if the fence was there, and what openings there are in it, and we will consider these questions later when you argue them.

Mr. PLATT.—My question is only directed—in order that the witness will understand it, and I think counsel will too—is directed to the 30 miles of fence about which you have testified, and I am asking you now the aggregate distance of openings in the 30 miles of fence about which you have testified, and which openings you said were the opening of 150 feet, to permit the road from Midas to Gold Circle, I think it is, to cross the land, or cross the fence, and in addition to that, two gates. What I want is the aggregate distance in feet, of these openings in that 30 miles of fence.

A. It would be over 200 feet.

Q. Well, how much over 200 feet?

A. Well, I think I said the gates were about 30 feet wide.

Q. Then state approximately what the distance would be. A. About 210 feet.

Q. Counsel asks the question as to which point

(Testimony of Ira M. Flocker.)

upon the map that is, and I answer counsel by stating that it is to a point marked upon the plat as "Opening No. 6 $\frac{1}{4}$ mile."

Mr. LEWERS.—Thank you; I understand it.

Mr. PLATT.—(Q.) That, as I understand it, was the condition of the fence, a portion of which you have just testified about, at the time of your second visit in April, 1911, and before your third visit, in July of that year? [29]

A. That was the condition that I found. I may have overlooked a gate, or something, but I didn't find any.

Q. Now, I wish you would state—

The COURT.—Excuse me a moment. You objected to the testimony with reference to the condition of the fence at the time of the second visit, because the issue here is the condition at the time the suit was brought, do I understand?

Mr. LEWERS.—That is correct.

The COURT.—Now, was there another visit which was nearer the date when the suit was commenced than this April visit?

Mr. PLATT.—No, your Honor, the third visit was some time after the suit was instituted.

The COURT.—The third visit was in July, after the suit was brought, and the second visit was in April, before the suit was brought, in May?

Mr. LEWERS.—They are about an equal distance apart; the second visit was in April, and the third visit July 22d.

Mr. PLATT.—The first was September 7th, 8th

(Testimony of Ira M. Flocker.)

and 9th of the year 1910, and the second was in April, 1911, and the third in July, 1911.

Q. What does the blue indicate upon the plat?

A. It indicates patented land.

Mr. DENMAN.—I move to strike out the answer, and object to the question on the ground it calls for the conclusion of the witness.

The COURT.—The question was, what does the blue indicate?

Mr. DENMAN.—Yes.

The COURT.—I will allow the question.

Mr. PLATT.—Of course, I submit I asked him just what it indicates, not what it is, I desire the map explained.

The COURT.—Of course that is a matter subject to proof; you [30] cannot prove title by a map, but what that blue indicates on the map, I think that is very proper to show.

Mr. PLATT.—(Q.) What does the white within the boundaries defined by the fence which you have represented upon the map, indicate?

(Same objection. Same ruling.)

Q. What does the white indicate?

A. It indicates vacant land.

Q. What do you mean by "vacant land"?

A. Vacant and unappropriated public lands of the United States.

Mr. DENMAN.—I move to strike the answer out on the same ground.

The COURT.—I will allow that as an explanation of the map, not as proof of the title.

(Testimony of Ira M. Flocker.)

Mr. PLATT.—(Q.) Now, upon the right-hand margin of the map, Mr. Flocker, in red, and under the caption “Remarks,” you have a written designation, I wish you would explain that.

Mr. DENMAN.—Before it goes into the record I would like to examine it. (After examination.) I object to that on the ground that the red matter shows on its face that it is hearsay evidence as to the time on which certain work was done on the fences. That is correct, is it not, purely hearsay?

WITNESS.—Yes.

Mr. DENMAN.—The whole matter is hearsay.

Mr. PLATT.—Well, if the Court please, I think some of that objection is well taken. I thought the remarks were in the nature of a legend explaining the plat; they do, in part, explain the plat, but with the explanation given orally they are really not essential, and I do not desire to take issue with counsel upon the objection interposed.

Mr. DENMAN.—The understanding is when the map goes in evidence the red matter on the left is deemed to be excluded? [31]

Mr. PLATT.—No objection to that.

Mr. DENMAN.—We ask to mark an excision line, so if the case goes up, the upper court will have no difficulty in determining.

(Marks on map.)

Mr. PLATT.—(Q.) At the southeast corner of the plat you have designated what purports to be a legend, and I wish you would explain that.

A. The straight black line indicates fence line; the

(Testimony of Ira M. Flocker.)

small blue square indicates State land; the small red square indicates right of way filing for reservoir site; the straight line with the little cross line indicates a gate; the two lines drawn free hand with cross intersections, represents natural barrier; a red line indicates new fences constructed after the original report, original examination; the small white square represents vacant Government land; the free hand lines drawn close together represent very steep country; and the dotted line indicates a road; the straight black line with the small lines on one side, that symbol represents gap.

Q. Now, Mr. Flocker, when did you compile the data in order to depict upon the map the vacant Government land thereupon represented, and about which you have just testified?

A. I think it was the latter part of September, 1910.

Q. For the purpose of the map did you make any other or additional investigation, after September 10th, to ascertain whether any of the Government lands depicted upon the map were taken in private ownership?

A. I made an examination day before yesterday.

Q. And from the time that you made your examination in September, 1910, up to and including yesterday, did you find any changes in the ownership of the Government land depicted upon the plat, and about which you have just testified?

A. No, sir. [32]

Q. As I understand it, that part within the so-

(Testimony of Ira M. Flocker.)

called inclosure represented upon the plat in the white, was the condition of the lands in September, 1910, and that that condition remained the same up to and including yesterday of this year?

A. Yes, sir.

Q. Now, at whose request did you make this plat, Mr. Flocker? I ask that question with a view of explaining another delineation, or another explanation upon the plat; I am not particular whether it is made a part of the exhibit or not, but it ought to be explained.

A. This is the plat which I gave Mr. Melrose to send in with his report.

Q. And when did you prepare the plat?

A. July 26th, 1911.

Q. And from what did you prepare the plat?

A. From other data which I had.

Q. Now, Mr. Flocker, upon your first visit to the land about which you have testified, did you in fact make an actual survey, running the lines of the fence, in order to ascertain accurately as to the exact situs and condition of the fences delineated upon your plat? A. No, sir.

Q. State what method you pursued for the purpose of obtaining accurate data to represent upon the plat which is now before the Court.

A. I compiled the map from the Land Office records, the Land Office plats, and I used a survey which had been made by E. C. McClellan for a guide on the southeast corner, and from the Parkinson ranch house and plats, for a check on the west, and I ran

(Testimony of Ira M. Flocker.)

the lines nearly with the compass, here and there taking angles, and I had a small book of profile paper, which I indicated according to the distance secured from counting fence posts, or approximate distance, the fence being practically all on patented land, the two streams, holding the same, I was able to lay down my traverses, and fragmentary traverses, in approximately a proper position. [33]

Q. Then as I understand it, the plat from which you have been testifying, is not an accurate, but an approximately accurate delineation, resulting from the investigation which you made in the manner in which you have testified? A. Yes, sir.

Mr. PLATT.—If the Court please, I desire to offer the plat in evidence.

The COURT.—Any objection?

Mr. DENMAN.—No objection to the plat—well, it may be better again, to suggest our objection, in so far as the plat shows conditions other than at the time the suit was filed, or subsequent thereto, and showing what the Court now has to operate on as a court of equity, it should not be admitted. But our suggestion is, when the Court admits it, it admit it for that purpose.

The COURT.—Of course I shall admit the map, subject to your objections; and, as I understand, all this testimony is to be considered, so far as it throws light on the conditions existing at the time the suit was brought; and evidence which does not tend to show those conditions, of course is irrelevant, and ought not to be in. That is my present view of it.

(Testimony of Ira M. Flocker.)

Mr. DENMAN.—To suggest what we may further bring out, it is our contention that if, *pendente lite*, there be an abatement of an alleged nuisance, that a Court of equity will thereupon refuse to consider the case, on the ground it has nothing to operate on, if it is a case for an abatement; and I maintain there is no allegation of threats to reconstruct, in the bill, or anything of that kind.

The COURT.—That is something I cannot consider now. That is something that will, of course, be taken up later. You do not make that an objection to the admission of this map?

Mr. LEWERS.—We desire that in the form of an objection to [34] save the record; and we ask for an exception to the ruling of the Court, in order to save the record.

Mr. PLATT.—As I stated, I am not attempting to argue objections at this time.

Mr. LEWERS.—We are not making the objection with the expectation that it be argued, but merely for the object of not appearing to pass the point.

The COURT.—If there are any objections you rely on, I expect you to argue them later. If we stop to argue every objection, we would not get through until the middle of the summer.

Mr. DENMAN.—There are two objections I made, to which I did not take an exception to your Honor's ruling, and at this time I would desire an exception.

The COURT.—Very well.

Mr. PLATT.—May this exhibit, if the Court

(Testimony of Ira M. Flocker.)

please, be marked Plaintiff's Exhibit No. 1.

The COURT.—Yes.

(The plat is marked Plaintiff's Exhibit No. 1.)

(Recess until 1:30 P. M.)

AFTERNOON SESSION.

Mr. PLATT.—If the Court please, respective counsel have consented that Mr. Kaufman may be excused from further attendance as a witness before the Court.

The COURT.—Very well, let the order be entered.

[35]

IRA M. FLOCKER, direct examination continued.

Mr. PLATT.—(Q.) Mr. Flocker, what is the general character of the land depicted upon the plat within the so-called inclosure in the white, if you know? A. It is sagebrush grazing land.

Q. Sagebrush grazing land? A. Yes.

Q. Have you made an estimate as to the leasing value per acre per year of that land?

Mr. DENMAN.—Object to that.

Mr. LEWERS.—To which we object on the ground that the testimony sought to be elicited by this question is incompetent, irrelevant and immaterial, in that there is no question of the leasing value, or any other value, involved in the pleadings; that this is an action in equity for a mandatory injunction against an inclosure, and that there is no allegation in the complaint as to damages, and that no damages can be recovered in an action of this kind. We make the further objection that the testi-

(Testimony of Ira M. Flocker.)

mony should not be received, because no foundation has been laid authorizing inquiry into any such matter, even if it were pleaded in the complaint, in that the Government has not shown that they are entitled to the equitable relief prayed for in the bill.

Mr. PLATT.—If the Court please, as to the question of equitable relief, we have a general prayer in the complaint, asking for general, equitable relief. There is also a prayer in the complaint calling for an accounting on the part of the defendant for the use of this land.

The COURT.—I will allow you to introduce this testimony; subject to the objection, though.

Mr. DENMAN.—May I inquire—one moment, Mr. Platt; do you contend under the interlocutory order for an accounting this testimony [36] is relevant?

Mr. PLATT.—Under the averment for an accounting, and under the general prayer for equitable relief in actions of this character, in my judgment the testimony is relevant.

Mr. DENMAN.—There is no *ad damnum clause*, no claim for damage done. There is a claim for an accounting, but you cannot get an accounting on a trespass; and we add that as an objection.

Mr. PLATT.—I am ready to submit authorities on that point.

The COURT.—I am making this order as I do, because I want to get through. I am in a hurry, and whatever testimony you offer in good faith, I am going to allow it in, subject to the objection.

Mr. LEWERS.—I make this suggestion: I antic-

(Testimony of Ira M. Flocker.)

ipate, in the light of what your Honor suggests, in disposing of this rapidly there will undoubtedly, from indications, be considerable testimony along this line; now if our position is correct, and under the authorities we are very confident of our position, under the decisions of the Supreme Court of the United States, why such testimony cannot be properly entertained at all, and its exclusion will save a great deal of time.

The COURT.—How much testimony is there of that kind?

Mr. PLATT.—There is very little, if the Court please.

Mr. DENMAN.—It throws it on us; we have got to go in and meet it on the other side.

The COURT.—Well, I think I will go on to-day, for the present, and you can submit your authorities on that point any time during the day.

Mr. LEWERS.—We desire to be heard, and under that condition we probably had better present that at some later time when your Honor can give us the opportunity. In the meantime, we desire to be allowed an exception upon all the grounds stated.
[37]

Mr. PLATT.—Will you read the question?

(The reporter reads the question.)

Mr. LEWERS.—We desire to add another objection: There has been no foundation laid as to the qualification of this witness; and, in addition, nothing shown as to his knowledge of the reasonable leasing value of property in that community, and this

(Testimony of Ira M. Flocker.)

would be merely speculative and dangerous guessing. The witness has been there three times.

Mr. PLATT.—I think that is a good objection, in the absence of a foundation that he has accurate knowledge, and upon that objection, if the Court please, I withdraw the question.

Q. Now, Mr. Flocker, in your experience since you have been in the employ of the Interior Department, how many unlawful inclosure cases have you examined?

Mr. DENMAN.—I object to that on the ground it is irrelevant, immaterial and incompetent.

The COURT.—It will only be admitted on his competency to answer the question.

A. I can only approximate the answer.

Mr. PLATT.—Give me an approximate estimate.

Mr. DENMAN.—Same objection. I suppose the same ruling, your Honor?

The COURT.—The same ruling.

Mr. DENMAN.—We note an exception.

A. Perhaps 25 or 30.

Mr. PLATT.—(Q.) How many of those were examined within the District of Nevada, approximately? A. About half.

Q. In addition to these enclosures to which you testify, did you in addition to that, examine the character and nature of the lands alleged to have been inclosed? A. Only in a general way. [38]

Q. Did you ever examine them with a view of ascertaining their character, and ascertaining the approximate valuation for their use? A. No, sir.

(Testimony of Ira M. Flocker.)

Q. Then, as a matter of fact, you have not had sufficiently intimate knowledge with the character of the lands, and these particular lands, so as to testify as to their possible leasing value.

A. Well, I don't think I have.

Mr. PLATT.—That is all.

Mr. DENMAN.—Is that all you have to ask of the witness?

Mr. PLATT.—That is all.

Cross-examination.

Mr. DENMAN.—(Q.) In the northeast corner of this map there appears a legend or insignia, called "Toejam Mountain," and I see by the legend underneath, that that is described as a natural barrier—by the way, have you read the complaint in this case?

A. I have looked over portions of it, I don't know as I have read it all.

Q. Read descriptions of the fence and of the inclosure? A. Yes.

Q. You helped the District Attorney prepare that complaint, did you not?

Mr. PLATT.—I object on the ground it is improper cross-examination, incompetent, irrelevant and immaterial, whether he saw the complaint or whether he did not.

The COURT.—Well, I don't think it is; but it will not make a particle of difference with the decision in this case, absolutely none, whether he drew that complaint, or whether he did not. If it should appear here that he drafted that complaint and did all the work, except appearing here in court, it would [39]

(Testimony of Ira M. Flocker.)

not make a particle of difference.

Mr. DENMAN.—I understand that. It is leading up to an entirely different thing. I want to show in drawing the complaint, he made the complaint inconsistent with the statement he has made here on the stand, and inconsistent with this map.

The COURT.—Then his attention should be called to the complaint, and the signature on the bottom of it, to show that his statements do not agree, if that is the purpose of it.

Mr. LEWIS.—He might be bound by having made the statements in the complaint, if the Court please, and yet his signature not appear on it.

Mr. DENMAN.—If he said to the District Attorney—

The COURT.—Well, go on, I will not shut you off.

Mr. DENMAN.—If he had said to the District Attorney, your description is correct, you have in your complaint a proper description of that natural barrier, and of the fences connecting up with it; if he had said that to the District Attorney, and now says something else in his map, this inconsistent statement is admissible for the purpose of showing at another time he made another and different statement.

The COURT.—On cross-examination you want to prove a conversation, not in direct testimony, with the District Attorney, and then you want to take the complaint, and show they do not agree, in order to show his testimony is not reliable?

Mr. DENMAN.—To show on this particular portion of his testimony he has made contradictory state-

(Testimony of Ira M. Flocker.)

ments; that is, on the testimony given in direct examination.

The COURT.—I think it is going to take a good deal too much time. All I want here are the facts, and I tell you very frankly, it seems to me, gentlemen, there are a good many facts here you ought to stipulate. [40]

Mr. LEWIS.—There are many we are willing to.

The COURT.—I think *there* a lot of facts you could stipulate and save a great deal of time. All I want to know are just what the facts are, and from the character of the witnesses you have here, there is not going to be such a great deal gained by long cross-examinations, or long direct examinations. I know a good many of these men, and it seems to me you ought to shorten this trial a great deal by admitting those facts about which there cannot be any dispute.

Mr. LEWERS.—We are willing to do that, if the Court please.

Mr. DENMAN.—Not only willing, but I offered to the District Attorney to sit down with him at any time he would designate, and prepare an agreed statement of facts for the Court, and he declined to do so. I made that offer on two occasions.

The COURT.—All I can do is to suggest.

Mr. LEWERS.—There is a great deal more in connection with the particular branch of the examination now entered into by Mr. Denman than appears upon the face of it, and we are entitled to get at the exact facts; and we are entitled as a part of the cross-examination to show, if we can, that prior contradic-

(Testimony of Ira M. Flocker.)

tory statements have been made, for the purpose of testing the accuracy of the report made by the witness.

The COURT.—Very well, you will have to proceed in the regular method, as to whether on a certain occasion, he, in the presence of certain parties, did not make a certain statement.

Mr. DENMAN.—(Q.) Mr. Flocker, referring again to the design under the name of Toejam Mountain, that is marked as a natural barrier?

A. Yes, sir.

Q. Do you claim that there is a natural barrier extending from the fence here—

A. (Intg.) There is no fence there.

Q. Pardon me, there is. [41]

A. With that new fence.

Q. I am referring now to the red line which is to the direct south of this Toejam Mountain natural barrier, and which adjoins it at the bottom of the vertical center line of section 34. Now, is it your contention that there is a natural barrier extending from that red, ending at the point I have indicated, to the fence, which is marked "North's Fence," lying to the westerly of the barrier?

A. No, sir, not all the way.

Q. How much of the way would you say there was a barrier extending across there?

A. Well, most of the way. There is a space between the barrier and the fence, and it might be possible at one or two places to get over the barrier, between that and the other fence mentioned.

(Testimony of Ira M. Flocker.)

Q. Describe that barrier.

A. It is an outcrop of rim-rock, it is not very high in places, and not very good as a barrier.

Q. Is it not true there is half a mile of territory there that cattle can graze over?

A. Perhaps half a mile.

Mr. PLATT.—I submit that question is objectionable, because it calls for an opinion of the witness as to whether cattle may graze over it or not. I think your Honor may determine that from the facts.

The COURT.—I will allow that question.

Mr. DENMAN.—(Q.) Now, as a matter of fact, is it not true there is a mile of space there?

A. Not in my opinion.

Q. Are you a cattle man? A. No, sir.

Q. Now, as to the fence at the place under the word "Creek," in section 28 of township 39 north, range 48 east, you remember you had some doubt on direct examination as to whether or not there was a gate there when you made your examination in the month of April, 1911. Now, as a matter of fact, when you made that examination, was there not an opening through which this road ran, but [42] a gate on the left of it turning into the field?

A. Well, that may be true, I am uncertain. My impression is that there was a gate there.

The COURT.—Will you explain that question, Mr. Denman? I do not understand just what you mean.

Mr. DENMAN.—The road running from Midas through the opening here, across the Government land and the State land up here, came out here

(Testimony of Ira M. Flocker.)

through an opening; there is no gate on the road, but there was a gate at the immediate left, entering into a field on this side.

Mr. LEWERS.—I can illustrate so the Court can understand. Something like that (drawing on black-board); this representing the road (indicating), and that representing the gate; the question is whether that was the condition; the gate turning into this reservoir field.

The COURT.—Is there more than one field?

Mr. LEWERS.—Well, the map does not show it. It is shown that there is more than one.

The COURT.—Is this road you have made there, is that the road you just pointed out from Midas to Tuscarora?

Mr. LEWERS.—That is a road that leads out here at opening No. 1, that goes right through the alleged inclosure.

Mr. DENMAN.—Here is Midas about here, here is the town of Dutton (indicating), and right about in here the road runs through across up Willow Creek, inside the alleged fence, crosses the red line fence here through a lane, an open lane, and goes along on the outside of the fence thereafter.

The COURT.—Is that road fenced?

Mr. LEWERS.—No, there is no contention there is any fence on that road. [43]

Mr. DENMAN.—The road is open at both ends; the road runs right through.

The COURT.—But there is a lane through which they enter the main field?

(Testimony of Ira M. Flocker.)

Mr. LEWERS.—Yes.

Mr. DENMAN.—The road runs through a lane, and that lane has fields on both sides of it, which are in private ownership; and the road runs down on State land through here, and then crosses the Government land here (indicating on plat), and comes out here, all open and unfenced, but at this point there is an open lane where it passes through a fence.

Mr. PLATT.—Of course, if the Court please, I take issue with the statement.

Mr. DENMAN.—I mean this is our contention.

Mr. PLATT.—I take issue with the statement that this road is open and unfenced, because the plat shows it is fenced.

The COURT.—What I was asking was whether the road was a lane.

Mr. LEWERS.—It is a lane for a quarter of a mile, is our contention.

Mr. DENMAN.—I think it is less than that.

Mr. LEWERS.—Less than that, yes.

Mr. DENMAN.—(Q.) Now, coming to your trip in April of 1911, where did you start from on that trip? A. Trip in April?

Q. Yes. A. Started from Midas.

Q. When did you arrive there?

A. When did I arrive in Midas?

Q. Yes.

A. I think it was the evening of the 9th of April.

Q. Where did you go, where did you stay?

A. I stayed at two different places, I am a little uncertain as to which one I stayed at this time, but I

(Testimony of Ira M. Flocker.)

think it was some little rooming-house they had.

[44]

Q. You arrived that night, did you? A. Yes.

Q. Started out the next morning on the trip?

A. Yes, sir.

Q. And where did you go first, or what did you take? How did you go, horseback or a-foot?

A. In a buggy.

Q. Who was with you in the buggy?

A. Mr. Backus.

Q. Where did you drive to first?

A. We drove down to opening No. 1, and entered the inclosure there, finding that new fence which is marked in red; and I took angles on the fence line, so I will be able to run it in there between the control lines, also went around to the gate on the other side, and located the gate on the inside fence.

Q. Yes. Where did you go then?

A. I may be mistaken about that being the first day; I think the first day, I could not tell without the daily reports; I think that was the second day. The first day we went out along—

Q. Where did you go to when you left Midas the first day?

A. The first day we came down to this opening, and then we went back and went up the road—gate No. 1—and then went up the road to what is called the Pitch Fork Ranch house on Fraser Creek, then up along the fence, up about this far (indicating).

Mr. LEWERS.—Where is “this far”?

Mr. PLATT.—Just designate that point.

(Testimony of Ira M. Flocker.)

A. Somewhere about the center of section 33 of township 40 north, range 48 east.

Mr. DENMAN.—(Q.) That is, you rode that distance? A. No, sir, not all the distance.

Q. Well, you rode some of the distance?

A. Well, a road has been made by hauling around the fence in a great many places.

Q. How far from the fence is that road?

A. The road runs right along the fence most of the distance. [45]

Q. Most of the whole distance?

A. Yes, sir, with the exception of down here.

Mr. PLATT.—When you say “down here” the reporter don’t know what you mean.

A. At Opening No. 1.

Mr. DENMAN.—(Q.) You did not say in your direct examination that you rode that fence carefully from Opening No. 1 to Opening No. 4.

Mr. PLATT.—The witness misunderstands the question, and counsel misunderstands the witness. The witness is referring to a road, and counsel is referring to riding along the fence.

Mr. DENMAN.—Do you understand the question now?

A. I think so. My examination in April, I merely went near enough in places in order to be reasonably certain that there had been no changes made in the fence line.

Q. You mean the general line of the fence?

A. Yes.

Q. You were not near enough to see the openings

(Testimony of Ira M. Flocker.)

along that line of fence in April?

A. Along a great portion of them.

Q. Now, as a matter of fact, is it not fair to say, you could not swear to over a quarter of that length, as to whether there had been additional openings put in or not? That is correct, is it not?

A. Well, I would not limit it to a quarter of the length.

Q. Well, 30 per cent?

A. Well, of course, I would have to inspect the map more closely to give a definite answer.

Q. You know what you did on that first day where you went around there?

A. You mean during the first day only in your question?

Q. I mean during the first day, yes.

Mr. LEWERS.—You mean September 10th?

Mr. DENMAN.—No, this is in April, 1911.

Mr. PLATT.—He does not pretend to testify that he examined all the fence during the first day. [46]

Mr. DENMAN.—That is what I want to bring out, what he did the first day and the day after.

A. As I say, I went only up about as far as section 33 from the Pitch Fork Ranch house, or about from the Pitch Fork Ranch house, was practically along the fence all the way.

The COURT.—(Q.) Cannot you say about what portion of that fence you examined with care on that occasion, so that you could testify positively as to what openings were there, and what were not?

A. I examined that portion about the Pitch Fork

(Testimony of Ira M. Flocker.)

Ranch house on Fraser Creek.

Mr. DENMAN.—(Q.) That is on Opening No. 3?

A. Yes.

Q. From there up to Opening No. 4?

A. Beyond that up to the middle of section 33, township 40 north, range 48 east.

Q. As a matter of fact, you didn't examine this portion here at all, did you, between Opening No. 1 and Opening No. 3?

A. No, sir, I didn't go along the fence there.

Q. I thought so. Now, when you were there in the month of September, 1910, don't you recollect the opening you found in section 35 in township 40 north, range 48 east, about 200 feet, four post holes?

A. I don't remember that opening.

Q. It might have been there and might not?

A. I don't remember it.

Q. Well, you said this morning there might have been an opening or two that you failed to put on?

A. Yes, sir.

Q. As I understand it, this fence which runs from section 9, township 40 north, range 49 east, running through 8, 5, 4, 33 and 40, in that township and range, then entering into 33, and passing through 33 and 34 of the Toejam Mountain, as I understand that was not there when you were there in April?

A. No, sir.

Q. That was built some time before your trip there in July? [47]

A. I will not testify positively on that point, because I didn't go up further the next day than to

(Testimony of Ira M. Flocker.)

determine whether or not this next gap existed, so I could not see that fence up there, but I was informed later—

Q. It don't matter what you were informed; I simply want to know what you know yourself. You did not see that until July, 1911? A. No, sir.

Q. Do you know whose fence that is?

A. I was informed by Mr. Petrie.

Q. You don't know of your own knowledge?

A. No, sir.

Q. What is the nature of this so-called barrier; that is to say, the barrier in section 4, township 39 north, range 49 east?

A. The country in here is—

Q. I am talking about this barrier, marked as a "Barrier." A. Yes.

Q. What is that?

A. That is a barrier of rock from which the soil has been washed away by the stream swinging against the side of a rocky knob in here.

Q. Do you contend that barrier extending through easterly is impassable to grazing cattle?

A. That barrier?

Q. Yes.

A. Perhaps not absolutely impassable.

Q. I am talking about this barrier in section 4.

A. Perhaps not absolutely impassable, no.

Q. Could cows and calves graze over there or not, in your opinion?

A. They could go through, but I say the tendency would be for them not to go through.

(Testimony of Ira M. Flocker.)

Q. How about a wagon driving through?

A. I never drove down over it.

Q. I am not asking you that; I am asking about the possibility of a wagon driving over it?

A. I don't think it is possible.

Q. How about driving a wagon over here, on this Toejam Mountain? [48]

A. I don't think it is possible.

Q. Is it not true there is three-quarters of a mile of territory in which wagons can be driven right through there to Tuscarora?

A. I don't think so.

Q. Did you ever go on that mountain?

A. No, sir, I never was up on top of it, merely saw the barriers from down in here.

Q. Didn't you, as a matter of fact, drive over this barrier with Mr. Petrie in July?

A. No, sir, Mr. Petrie came down this way, inside of the fence.

Q. You don't contend this is a barrier here, do you?

A. I contend that is a very steep country; it is not a barrier.

Q. What do you mean by "steep country"? As a matter of fact, the richest feed is in the steep country, is it not. That is so, that is a fact, is it not?

Mr. PLATT.—If we are going to get opinions of witnesses, I have plenty of witnesses to express opinions, if that kind of testimony is going to be permitted.

The COURT.—I would like to hear him tell just

(Testimony of Ira M. Flocker.)

what the facts are, just what that is, so I can have some idea.

Mr. PLATT.—I have no objection to his testifying as to the nature of the barrier, but the question of expressing opinions. I did not ask his opinion as to the value of the lands when he showed he was not qualified to testify.

Mr. DENMAN.—(Q.) Let me ask you this: Is it not a matter of fact, you found that was rich in feed?

A. Well, I would say, as I remember it, there was more feed there than down in the inclosure.

Q. Is it not also a matter of fact that these drift fences are for the purpose of turning cattle up in the mountain territory there?

A. I don't know.

Mr. PLATT.—I object to that, because he is asked if the purpose [49] of a drift fence was so and so.

Mr. DENMAN.—A man can tell much better who has seen the country, and has seen the feed, as to what the apparent purpose of these alleged obstructions may be.

The COURT.—I should think the witness could tell enough about those barriers, so that the Court could decide for itself whether they would turn cattle or not, and tell how steep they are, and how high they are, and how rugged they are, and whether covered with timber, or what the nature of the country is.

Mr. DENMAN.—(Q.) You were never in the Toejam Mountains?

A. I never was up to the barrier, up to the rock outcrop.

(Testimony of Ira M. Flocker.)

Q. Do you know whether there is any rock outcrop? A. I could see it.

Q. How far were you from it? I am talking about the time you went with Mr. Gray?

A. Mr. Gray and I walked across, about in that position (indicating on plat), a distance of perhaps about a mile or more.

Q. From the barrier?

A. There was a valley between where we were and the outcrop.

Q. Then the next time you went there, you didn't go as near, the next time, did you?

A. No, sir, I didn't go up to look at it at all, I could see from where I was.

Q. Now, when you went there in July, you didn't go over to the barrier, did you?

A. Not all the way.

Q. Not all the way, you didn't go beyond North's fence, did you?

A. Mr. Melrose and I went up the same ridge that Mr. Gray and I had gone up.

Q. This valley you saw, where did that go to?

A. That valley went into this stream down here, called Jenkins Creek, I think on the map. [50]

Q. And where did it go in the other direction?

A. There is a low divide in here between that and the drainage this way.

Q. Is there any brush in that country?

A. A growth of trees and brush along the stream.

Q. How thick is that brush, would it turn cattle?

A. No, sir, I don't think it would turn cattle; I

(Testimony of Ira M. Flocker.)

saw cattle there.

Q. You saw cattle feeding all through here, didn't you? A. Not on the other side of the mountain.

Q. I am aware of that, but presume it is not so much of a mountain, you saw the cattle feeding right up the side when you were there with Gray, didn't you? A. I don't remember any.

Q. Might have been there and might not?

A. There may have been, if there were, they were low down, I know there were not any very far up.

Q. Did you follow any of the cattle trails in there to see where they went? A. No.

Q. You don't know anything about the condition of the cattle trails there? A. No, sir.

Mr. DENMAN.—That is all. Take the witness.

Mr. PLATT.—That is all.

The COURT.—Just a moment. (Q.) When you were there on your second visit in April, 1911, how many openings were there in the entire enclosure?

A. Well, I saw only four on the April trip.

Q. On the April trip?

A. Oh, on the April trip, refencing had only been constructed up this far, this portion was not there; there was an opening between that and the old fence.

Mr. DENMAN.—Pardon me, I want this in the record. (Q.) As I understand, when you were there in April there was no fence between [51] the point marked 31, that is, the middle of section 31 in township 39 north, range 49 east, and a point marked 29, under the words "Siawappe Corral"?

Mr. PLATT.—The map does not so indicate.

(Testimony of Ira M. Flocker.)

Mr. DENMAN.—Pardon me, just let me have the witness.

A. The old fence line was standing; the new fence line had not been constructed.

Q. You allege—now be careful about this—in the month of April when you were there, that the old fence line was standing between the middle of the westerly line of section 32 in township 39 north, range 49 east, and the point marked 29 under the words “Siawappe Corral”; do you mean to say there was standing a fence in the month of April, 1911 there, that it was not down?

A. Yes, sir; it was extending down to the Tuscarora road, at the point—

Q. In section 32? A. Yes.

Q. Then there was an opening there then of about a half a mile? A. Yes, sir.

Q. Are not you mistaken as to that; were not the posts standing there, and the wires off?

A. I will state positively the old fencing was there, standing there.

Q. Wires and all? A. Yes.

Q. You swear to that positively? A. Yes, sir.

Q. An opening of about a half a mile, you say?

A. Yes.

The COURT.—(Q.) Where was the next opening of the four?

A. In the month of April I discovered that the opening or gap shown in my original report, beginning at section 20, township 39 north, range 49 east, extending up to Nelson’s fence, was unfenced.

(Testimony of Ira M. Flocker.)

Q. That was the second opening; how long was that opening?

A. That was about two miles. [52]

Q. That is the second one; now the third one.

Mr. PLATT.—Let me understand that, with your Honor's permission. The fence indicated in the red, beginning in section 20, township 39 north, range 49 east, and running up to a point indicated by an arrow from opening No. blank, state whether or not in April that fence indicated by the red was up or down?

A. It was down. It was not constructed until after April.

Q. It was constructed in July?

A. As near as I know.

Q. Then this gap about which you testified, was a gap when you visited the land the second time?

A. Yes, sir.

Mr. DENMAN.—(Q.) There is only two; now the third gap.

A. Well, the condition up there I am unable to testify to on the April examination, because I didn't go up there.

Q. Then for all you know—the condition here you cannot testify to—but for all you know the condition was the same as when you went through there in September?

A. Yes, sir, I have reasons to believe it was the same.

The COURT.—(Q.) Now, where was the fourth?

A. Well, the gate was there, as shown in the

(Testimony of Ira M. Flocker.)

original report; the opening down here at the road, 150 feet wide; a new gate had been constructed in the inside fence.

Q. You told me there were four openings, you have given six.

Mr. PLATT.—I think he did not mean the gates.

The COURT.—I just want to understand. (Q.) I will ask you next how many of those openings had gates. Now, just give me to start with the number of openings, those where there were gates, and those where there were no gates. A. In April?

Q. At the time of your second visit, that is the last visit you made prior to the commencement of the suit.

A. As I testified, my impression is that there was a gate opening— [53]

Q. Well, just count the number of openings, and give us that number, then the explanation can come afterwards.

A. Five; however, I did not go around this portion (indicating).

Q. Well, would you count that six?

A. I assume that the conditions there were the same as when my original report was made.

Q. Well, count that 6, then. At how many of those were gates fixed?

A. I missed one. One right here (indicating).

Mr. PLATT.—That makes 7.

The COURT.—Well, 7 openings. Now, how many of them had gates?

A. Three.

(Testimony of Ira M. Flocker.)

Q. Three gates. Now, how wide were those gates?

A. Thirty feet wide, I should say.

Q. Now, the first opening you gave a while ago was half a mile? A. Yes, sir.

Q. And the next opening—

Mr. DENMAN.—That is the opening at number 6?

The COURT.—Yes. And the next opening was about two miles? A. Yes, sir.

Q. Now, that two-mile opening is south of the Toejam Mountain? A. Yes.

Q. Now, the third opening, where is that?

Mr. DENMAN.—At the Toejam Mountain?

A. If you are counting all this as one opening, the third would be up there, but I didn't see that in April.

The COURT.—(Q.) You didn't go there. Now, where is the next one that you did see?

A. A gate? The next one is down here (indicates).

Q. How wide was that? A. 150 feet.

Mr. PLATT.—That is the Opening No. 1, as indicated on your plat in the red? A. Yes, sir. [54]

Mr. PLATT.—And that is all, is it? Did you find any others? A. No, sir.

Mr. DENMAN.—One moment. As a matter of fact, you didn't traverse the territory from here to here on that April trip, that is, from opening, or about 33, in township 40 north, range 48 east, you didn't traverse the fence at all, around to about 20, in township 39 north, range 49 east?

(Testimony of Ira M. Flocker.)

A. No, sir.

Q. In the month of April? A. No, sir.

The COURT.—(Q.) What sort of a fence was it?

A. Post and wire.

Q. How many wires?

A. I think three, some places there might have been four.

Q. Now, what sort of mountains are the Toejam Mountains, what sort of an elevation is it?

A. Well, it is—I have never been in this country back in here, but I should judge it was spur from the high mountains between Tuscarora and Squaw Valley.

Q. What is the elevation above the surrounding country?

A. Perhaps 1,500 feet; that is only a guess, however.

Q. Are the slopes covered with grass?

A. Well, there is grass there.

Q. All the way up?

A. As far as I could see.

Q. Did you go up there at all?

A. Up on top of the mountain?

Q. Yes. A. No, sir.

Q. Could you go up?

A. Yes, sir, I think so.

Q. Could you ride down horseback?

A. I think so.

Q. How about this barrier down below?

A. This barrier (indicating)?

Q. Yes.

(Testimony of Ira M. Flocker.)

A. Well, that barrier, as I said, along near the stream, beside a rocky hill, by the side of a rocky hill, I should say it was a good barrier. My opinion is formed from other cases I have examined. [55]

Mr. LEWERS.—I move that be stricken out. We have no knowledge what was in those other cases.

The COURT.—(Q.) Could you ride over it horse-back?

A. I should say no, not this barrier.

Q. Would cattle go through there if they were driven, do you know?

A. I don't think they would go through there because they could be driven down there or there (indicating).

Q. Well, they could be driven over the barrier?

A. I don't think so.

Q. Could they be driven over Toejam Mountain?

A. Yes, I think they could in places.

The COURT.—That is all.

Mr. PLATT.—Call Mr. Robinson.

(Mr. Robinson takes the witness-stand.)

Mr. LEWERS.—Now, if this is a question of proving something on the map, I think we can save a lot of time as to the ownership.

Mr. PLATT.—I am agreeable to a stipulation, if we can stipulate. I desire to prove by Mr. Robinson that he is an official of the United States Land Office at Carson City; that he has examined the plats in the United States Land Office in connection with the plat as introduced in evidence, and that all of the land within the so-called inclosure is open, unappro-

(Testimony of Ira M. Flocker.)

priated Government land, and is so shown upon the tract books and plats in the United States Land Office; and that the lands indicated in the blue upon the plat are in private ownership.

Mr. DENMAN.—Which would indicate, Mr. Platt, that the fence was on private land, so far as you know?

Mr. PLATT.—So far as I know, we are willing to admit that, that is, with some few exceptions. I think there are one or two [56] places possibly, that that fence does not run on private land, as indicated by the plat, but in the main, that is so. I think in the main that is so, if the Court please, but the plat will speak for itself to that effect. It is immaterial whether it is all on private land or not, so far as the theory of the Government's case is concerned.

Mr. DENMAN.—We are willing to make that concession then, if that is the Government's theory.

Mr. LEWERS.—There is no need of going into the theory of proving all that represented in white being Government land. We will concede that for the purposes of the record.

The COURT.—Then is it conceded that the land marked in blue is in private ownership?

Mr. DENMAN.—Yes.

Mr. LEWERS.—We do not concede it is all ours, because it is not all ours.

The COURT.—That is as far as the concession goes?

Mr. DENMAN.—Yes.

Mr. LEWERS.—We are willing to concede fur-

(Testimony of Ira M. Flocker.)

ther, we don't claim that land in the interior, and never have.

Mr. PLATT.—Well, if the Court please, it is the contention of the Government that they have asserted a claim of right to it by virtue of having inclosed it.

Mr. DENMAN.—Well the statute provides that—

The COURT.—You don't lose anything by not arguing those statements, because I am not going to make up my mind about anything at present.

Mr. DENMAN.—I was going to state our concession. We concede that the Government owned that white land in there, that we did not claim any right to it; that we had no color of title to it. That is the situation. [57]

Mr. PLATT.—I think that is all with Mr. Robinson, if that may be admitted. Now, if the Court please, we can save a great deal more time if counsel may stipulate that the fence as indicated upon this plat introduced as Plaintiff's Exhibit No. 1, with the exception of such fence as is indicated upon the plat as being fence belonging to other parties or people, was a fence constructed and maintained by the defendant in this case, the Golconda Cattle Company.

Mr. DENMAN.—We won't concede that, because in the first place you have not shown all the openings. We cannot concede that.

Mr. PLATT.—If the Court please, I am trying to get stipulations if I can.

The COURT.—Well, I appreciate the effort that is made, and when you can agree, it is all right, and when you cannot agree you would be wrong to do so.

(Testimony of Ira M. Flocker.)

Mr. LEWERS.—If the map was a little different we could very quickly agree. In that connection, Mr. Platt, I will ask you whether you will agree that there is no fence leading from section 8 in township 40 north, range 49 east, into section 5, 4, and over into section 3, to the beginning of the barrier, which you have denominated on this plat as Toejam Mountain?

Mr. PLATT.—No if the Court please, I won't agree to that, because all of the testimony relevant to this plat is in, and I don't propose to stipulate to anything that is already in evidence. Now, Mr. Flocker, has testified concerning this plat, and concerning the fences as indicated upon the plat and that is a matter of testimony.

Mr. LEWERS.—I was merely inquiring as to whether you expected to prove the allegations of your complaint.

Mr. PLATT.—I am not trying this case to prove the allegations [58] of some other complaint.

The COURT.—Call the next witness.

Mr. PLATT.—Call Mr. Osborne. [59]

[Testimony of Drury P. Osborne, for the Plaintiff.]

DRURY P. OSBORNE, called as a witness by plaintiff, having been sworn, testified as follows:

Direct Examination.

(By Mr. PLATT.)

Q. State your full name, Mr. Osborne.

A. How is that?

Q. What is your full name?

A. Drury P. Osborne. You will have to talk a little louder to me; I am a little deaf.

(Testimony of Drury P. Osborne.)

Q. Where do you live?

A. I live in Biggs, California.

Q. Were you ever employed for the Golconda Cattle Company? A. Yes, sir.

Q. You were subpoenaed as a witness to testify upon the part of the Government, were you not, in this case? A. Yes, sir.

Q. Did you come to my office on yesterday in response to my request? A. Yes, sir.

Q. Did you inform me on yesterday that you would not discuss this case with me privately in my office?

A. Yes, sir.

Mr. LEWERS.—We object to that line of interrogation on the ground that it is an attempt to impeach their own witness.

Mr. PLATT.—That is it exactly. I am attempting to show that he is a combative witness for the Government.

Mr. DENMAN.—He has not shown it on the stand yet.

Mr. PLATT.—Well, I am attempting to show it.

The COURT.—Go on and ask the questions.

Mr. LEWERS.—The witness has the privilege to talk, or not to talk.

WITNESS.—I told you I would talk when I came before the Judge.

Mr. PLATT.—(Q.) You told me you would talk when you came before the Judge, and you refused to discuss the case with me in my office, before you were called as a witness, is that true? A. Yes, sir.

(Testimony of Drury P. Osborne.)

Q. Had you had any conversations with your attorneys, or with the attorneys for the defendant company, concerning this case after you were subpoenaed as a witness on behalf of the Government?

A. Why, I might have had some, yes.

Q. Where did you have those conversations?

A. Well, I talked to Mr. Lewers in Reno.

Q. And were those conversations with relation to the issues involved in this case?

A. Well, yes, to a certain extent.

Q. Did they know at that time, or did you tell them that you were a witness subpoenaed on behalf of the Government? A. Yes, sir.

Mr. LEWERS.—Now, if the Court please—

Mr. PLATT.—Now, Mr. Osborne—

Mr. LEWERS.—Just a moment.

Mr. PLATT.—I don't know whether there is a motion to strike out or not.

Mr. LEWERS.—No, there is no motion to strike out. Mr. Platt may not know it, but this witness was brought from California here by my order, and at our expense, and at our request, and I do not like the insinuation there was anything improper about my speaking to the witness. He was our witness long before he was subpoenaed by the Government. We brought him over, and took him over the ground, part of it, and took him up to Golconda.

Mr. PLATT.—(Q.) Were you ever employed by the Golconda Cattle Company?

A. I told you yes, I was.

Q. In what capacity?

(Testimony of Drury P. Osborne.)

A. I have filled every position, I guess, from brick-layer up to superintendent.

Q. When were you employed as bricklayer for the Golconda Cattle Company?

A. 1907, that I was laying rock up at the dam.
[61]

Q. State how long you continued in the employ of the defendant company, and what the respective natures of the employment were.

A. Well, I worked on the dam until some time in November; then I built the telephone proposition to Golconda, and from that I went back to Squaw Valley as foreman under Mr. Sibbles.

Q. Who was Mr. Sibbles?

A. He was supposed to be the manager of the Golconda Cattle Company at that time.

Q. And you were foreman under him as manager?

A. Well, he was manager, I was foreman.

Q. I say you were foreman under him as manager?

A. As my being manager?

Q. Mr. Sibbles was manager, and you were his foreman, is that true?

A. Yes, sir, that is true.

Q. How long were you foreman of the Golconda Cattle Company?

A. Something over three years, I guess, altogether.

Q. What were your general duties as foreman?

A. Well, it was to see that the work went on according to orders, I guess.

Q. That is, the general work of the Golconda Cattle Company?

(Testimony of Drury P. Osborne.)

A. First, I had the Squaw Valley country; of course I didn't have nothing to do with the river or the cattle or the sheep; I had the Squaw Valley country.

Q. I will ask you to examine the plat upon the blackboard, and testify whether or not it correctly represents the territory or the holding known as the Squaw Valley Ranch, over which you exercised your foremanship?

A. No, there is very little of the Squaw Valley Ranch there.

Q. When have you ever seen that map?

A. This map here?

Q. Yes. A. I saw it put here this morning.

Q. When?

A. I saw Mr. Flocker and Mr. Melrose put it up this morning. [62]

Q. Did you come up and examine it? A. No, sir.

Q. Oh, you did not? Have you examined it from that time up to now? A. Yes, sir.

Q. When did you examine it?

A. I looked at it at dinner time.

Q. And you say there is very little of the Squaw Valley Ranch upon that map?

A. It represents very little of the Squaw Valley Ranch.

Q. I will ask you if you can familiarize yourself from an examination of the map, as to any part or portion of the Squaw Valley Ranch correctly represented thereon? A. Certain points of it.

Q. Point out what those parts are.

(Testimony of Drury P. Osborne.)

A. Part of it up Willow Creek, and part of it Rock Creek.

Q. I wish you would step to the map and indicate with the pointer how much of that map correctly shows the so-called Squaw Valley Ranch.

A. This shows the Company land up Rock Creek (indicating on plat).

Q. At what point shown upon the map do you begin?

A. Well, it is hard—this is the corner of what is called the Fraser Creek field, that is the northeast corner of the Fraser Creek field, that was fenced in the spring of 1909.

Q. Now, wait a minute. That is the corner at the point indicated by "T" before 39, N. R., is the point to which you refer, and you say that was fenced in 1909? A. Yes, 1909.

Q. Who built that fence?

A. A bunch of Portuguese boys.

Q. In whose employment were those boys?

A. Golconda Cattle Company.

Q. How much of that fence did they build in 1909?

A. Built the complete fence, from right in about here, north; built very close, well, say the section 1, about a mile east of section 1 in township 38 north, range 39, ain't it? We ran that [63] fence north, a half and a mile and a quarter, is a mile and three-quarters, is maybe two mile; I could tell if I had the other map. Then we ran east across the north line, ran east across to this point on the creek.

Q. What point?

(Testimony of Drury P. Osborne.)

A. I am pointing at now, you see (indicates).

Q. Yes, but I want it in the record.

A. If this map is drawn right, I don't know whether this is right or not, I am going a little by your fence. Our map shows that point.

Q. Now, I wish you would examine this plat and tell me whether the black line to which I am pointing, and which extends more or less—

A. (Intg.) Don't get too far; I know where it is at.

Q. (Contg.) And which extends more or less completely around the rim of the plat, whether that line correctly represents a line of fence belonging to the Golconda Cattle Company, belonging to the North's, or known as North's fence, and belonging to Nelson, or known as Nelson's fence?

Mr. DENMAN.—One moment. I object to that question on the ground several of the fences which are on the plat are not designated. It would be impossible for the witness to tell which fence you refer to.

Mr. PLATT.—I am confining him to those three fences as indicated on the plat. (Q.) I will ask you to examine the plat and answer that question, if you can.

Mr. DENMAN.—I object to that question. It is too vague. If counsel for the Government will simply follow around the fence, take his man around the fence bit by bit, he can trace up the question, but this general question as to whether it generally illustrates, it is too vague and unfair, and liable to lead the wit-

(Testimony of Drury P. Osborne.)

ness into assertions that he cannot follow out.

Mr. PLATT.—I am asking him to go around the fence, and examine the place, and ascertain whether that correctly represents [64] the things about which I have asked him?

WITNESS.—I would not want to answer that question for one reason, that the fence is not built as a fence that stands, the part that you have here, from here, this map may represent you all right to here (indicating), might represent you a piece further; but there is places in that fence it don't represent, and it is not there to-day as it is.

Q. Let me ask you, from the point indicated near the letter "T" before 39 N. R., 37 E., following in the black, along the black line—

A. That fence is not right.

Q. (Contg.) Up to a point designated as "Opening No. 4, 100" upon the plat, state whether or not that correctly represents a fence built and owned by the Golconda Cattle Company. A. It does not.

Q. Well, in what particular, does it not?

A. Well, in the first place, you have no—this fence here represents running due east and west, that fence don't run east and west, that fence bears to the right, running east would bear south into the Company's land probably at this point, probably two or three hundred feet off the line.

The COURT.—He is speaking about the fence at what point?

Mr. DENMAN.—Running westerly from the point "T," 39 N., R. 47 E., for about an inch and a half.

(Testimony of Drury P. Osborne.)

Mr. PLATT.—Now, in what manner is that fence incorrectly represented?

A. Why, instead of running direct on the line, the fence bears about 18 degrees to the south; running from the center of 20 it bears about 18 or 20 degrees to the south.

Q. Then, as I understand it, the portion of the fence about which you have testified runs down and it goes in some of the white here [65] off of the property of the Golconda Cattle Company? A. Yes.

Q. That is what you mean, is it?

A. That is the property of the Golconda Cattle Company?

Mr. DENMAN.—That is the property.

A. The surveys I have from Mr. Nelson and Mr. Webb of this Rock Creek Ranch here, Squaw Valley Ranch, I have orders, I can show you my orders, where I have certain land to fence in them 40's that runs down, that is Golconda Cattle Company land, down Rock Creek, right there, sir; if you had the whole map I could show you. This is the east fence on the right hand side of Rock Creek, running north-east and southwest.

Mr. PLATT.—(Q.) Let me ask you again: Is the fence from the extreme southwest corner of this plat up to the first point which I indicated, the point "T," was that portion of the fence constructed by the Golconda Cattle Company, if you know?

A. Part of it was, and part of it wasn't.

Q. What part was not?

A. Probably from right to this point. I don't

(Testimony of Drury P. Osborne.)

understand your map. This is an old fence here (indicates), and the old fence runs through here; this jog in here, this fence was here when I went to Golconda; we straightened that fence up from here on up, I built the fence up to that point.

Mr. DENMAN.—Let me facilitate that.

Mr. PLATT.—Just a moment.

The COURT.—Mr. Platt is examining the witness.

Mr. DENMAN.—I was going to make an admission. I will admit that the fence from the southwest corner through to North's fence, whatever fence is shown to be there along the line of this blue property here, was constructed by persons employed by the Golconda Cattle Company.

Mr. PLATT.—Well, was constructed by the Golconda Cattle Company? Now, there is no use quibbling; if we are going to have [66] an admission, let us have it, as having been constructed by the defendant Company.

Mr. DENMAN.—You have the admission, constructed by persons employed by the Golconda Cattle Company?

Mr. PLATT.—And pursuant to those orders.

Mr. DENMAN.—Well, the orders will develop later on.

Mr. PLATT.—I will take the admission, if the Court please, for what it is worth.

Q. Did you aid in the construction of the fence just outlined by counsel for the defendant company?

A. Well, yes. That is, now, I am testifying—I am not testifying that this fence as you represent it here

(Testimony of Drury P. Osborne.)

is as my surveys; we built the fence, and I am testifying by the fence as I built it by the surveys I had, not by the line you have drawn. If that represents it, if you run this exactly, your engineer or anybody, has run this fence from the point around to where you say, and that represents with the field-notes or survey line that I built that fence by, or had the fence built by, the fence then would be correct, otherwise the fence is not correct.

Q. Then as I understand it, so far as you know, you built a fence from a point designated at the extreme southwest corner of the plat, and running in a north-easterly direction, up to a point at the intersection of North's fence?

A. This question here—if the question as Mr. Denman put the question considered that the Golconda Cattle Company built the old fence, then the Golconda Cattle Company built the fence around that country.

Q. Now, I call your attention to the same point at which I began before, namely, the southwest corner of this particular plat, and I direct your attention to the black line, assumedly representing a fence, and I will ask you whether you aided in the construction [67] of that fence extending from that point in a north-easterly and easterly direction to a point indicated as the beginning of a gap in section 36 of township 39 north, range 48 east.

Mr. DENMAN.—Do you refer to the black line?

WITNESS.—No, I didn't build no fence like that.

Mr. PLATT.—(Q.) Do you know, as a matter of fact, whether the fence which I have indicated was in

(Testimony of Drury P. Osborne.)

fact upon the land of the Golconda Cattle Company at the time you assumed the foremanship?

A. This fence (indicating on plat)?

Q. Yes. A. It was not.

Q. Who, if you know, built this fence?

A. There was a fence built, not representing your line.

Q. Do you mean to say there was not a fence connecting at the original point from which I started, built along the side of what is designated on the plat as Willow Creek, running along past the reservoir, and crossing what is known as Hot Creek, up to the gap in section 36?

A. No fence represents that line.

Q. No fence there at all?

A. As your line run; there was a fence, but not on the line as you have the fence drawn.

Q. Where was it?

A. Well, in the first place, it is right here.

Q. Well, where is "right here"? Now, wait a minute, that is the first place, is it (indicating)?

A. That is one of them.

Q. Now, up to a point indicated as the commencement of the new fence, shown by the red line near opening No. 7, up to that point, the fence is correctly delineated?

A. If it is according to the field-notes and survey; I double surveyed there; I had Mr. Nelson survey it first, then I paid him \$58 to resurvey it in the spring, after a heavy snow. If that fence is on the line them flags were, with them field-notes will show I built

(Testimony of Drury P. Osborne.)

the [68] fence on, you are correct, otherwise you are wrong.

Q. Who did you build this fence for?

A. Golconda Cattle Company.

Q. While you were foreman?

A. Superintendent; I had raised a notch or two.

Q. From the point in which we stopped, section 28, township 39 north, range 48 east, state whether or not the black line correctly represents the fence as it was prior to April, 1910.

A. It does not. The line from that point up to here don't represent the fence at all.

Q. Well, now, where was the fence?

Mr. DENMAN.—We object to the question on the ground that fence was not a fence in existence at the time the suit was begun, and to show the line of the fence that did not exist on the 31st of May, is simply wasting the time of the Court.

WITNESS.—It never existed.

The COURT.—I don't see as it is material, Mr. Platt. If you have a point, you can put it in subject to objection.

Mr. PLATT.—The only thing is, I want, if I can, to establish the building of this fence in April, 1910; this red fence as a substitute for this other fence, that is all I desire to show by the witness, if he knows. I will withdraw the question, though.

Q. Now, I will ask you whether the red line as indicated on the plat, from the point in section 28, which I have indicated, correctly represents the fence built by the Golconda Cattle Company? A. It does not.

(Testimony of Drury P. Osborne.)

Q. Well, in what regard does it not?

A. Well, in several.

Q. What are they?

A. Well, places where the fence comes, you haven't the corners where the fence turns, and you haven't the sways in the fence, where the fence follows the road; the fence is all on the north of the road. We have an understanding [69] with the Supervisor—

Q. I don't care anything about that.

A. I say the fence don't represent it.

Q. You say the fence is all along the north road?

A. Your red line fence don't represent the fence.

Q. In what particular does it not? A. Several.

Q. Point out the particulars.

A. You haven't the turns around the reservoir right; you haven't the fence right around here; it is guess-work with you.

Q. Show where the fence is guesswork and where it is wrong.

A. I could not do that without a plat, and show on a real map, then I can show you exactly the Tuscarora road line, how the fence bends, and one thing and another. There is a fence, but your red line does not run as the fence runs.

Q. You have a distinct recollection in your mind just about the course in that reservoir?

A. Well, I might have forgotten it. I know there is curves, and I know there is corners; I know the way the fence comes up to the dam, and the way it goes over the dam, and around to the Tuscarora road.

Q. You say that fence does not correctly represent

(Testimony of Drury P. Osborne.)

the exact condition of the fence as it was in April, 1911? A. No.

Q. When were you last upon the property of the Golconda Cattle Company as shown here by the plat?

A. At that certain point?

Q. I asked upon the property.

A. Of what you have on the map?

Q. Anywhere. A. On the map?

Q. Yes. A. On this map of yours?

Q. Yes. A. It has been probably 9 months.

Q. You are sure you have not been there since?

A. I have been to Squaw Valley since, but not that part of it. [70]

Q. State whether or not the fence indicated in the red from the point which I originally designated in section 28, approximately represents the fence of the Golconda Cattle Company. A. It does.

Q. There is no question about its being joined to the intersecting point at 28 in the black, is there?

A. It is not joined.

Q. It runs right along approximately as indicated on the plat?

Mr. DENMAN.—You are not speaking of the openings in the fence?

Mr. PLATT.—I am speaking about the fence.

WITNESS.—He said it joined; it does not join.

Q. Where is the opening?

A. I don't know whether you have the exact spot or not, but the opening is in the lane, right there.

Q. Will you say that the opening shown here upon this plat, opening No. 7, 100, is in the wrong place?

(Testimony of Drury P. Osborne.)

A. Yes, sir.

Q. Now, you say that an opening is in the lane, don't you?

A. I say the opening at that place there does not represent where the opening is.

Q. I ask you if you didn't testify that the lane went through the opening in the fence?

A. Well, I might testify to that.

Q. Just a moment. I ask you if you didn't testify that the lane went through the opening in the fence?

A. I never answered that, did I?

Q. I ask you now to state whether or not you did not testify—

A. (Intg.) When did I testify?

The COURT.—Just listen to the question, and then after he asks the question, answer it, if you can.

WITNESS.—He gets mixed up.

The COURT.—Never mind, listen to the question, and if you don't understand it, we will have it asked again. [71]

Mr. PLATT.—(Q.) I ask you whether or not you did not testify that the lane ran through the opening in that fence?

A. No, the lane don't run through the opening. The lane runs through the opening; you could twist that two or three ways; the lane commences at the opening.

Q. The lane commences at the opening?

A. Yes.

Q. Now, does the lane run under the lower barb wire of the fence, or is there an opening in the fence

(Testimony of Drury P. Osborne.)

through which the lane runs?

A. There is an opening commencing with the lane.

Q. Now, I call your attention to what is designated here on the plat as the lane and road—

Mr. DENMAN.—Where is it designated road and lane?

Mr. PLATT.—Well, it is designated as the road.

(Q.) I will ask you if it is not a matter of fact that the lane is an extension or part of the main road.

A. Yes, that is, at the present time; it wasn't till we built the fence.

Q. Well, when was it made an extension of the main road? A. The first of April, 1911.

Q. About the first of April, 1911. Now, I ask you to examine this plat, upon which is indicated in the dotted lines this road and the lane which is an extension thereof, and state whether or not the road and lane does not run through an opening in that fence?

A. Well, at that certain point?

Q. Yes.

A. I could not say by your map. If you will tell or if I could see with the map where I built these fences by that spring, then I could tell you whether that is the lane or not, or whether the lane is down here (indicating).

Q. Well, you are positive, aren't you, that this lane and road runs through an opening in the fence indicated upon the plat by the red lines?

A. I don't know whether it is indicated by the red line. That is all right. I will say to the Court [72] that the opening is not at that point in the fence.

(Testimony of Drury P. Osborne.)

Q. How do you know it is not?

A. Well, I know it.

Q. Well, how do you know it?

A. I surveyed that country myself; I know the location of it, I know which way the fence runs, and I know that that opening, unless it has been cut since the first day of July, and a lane put in it, does not exist.

Mr. LEWERS.—If the Court please, I object to this method of interrogation; it is unnecessary. The witness has not shown an unwillingness to answer questions, and it is an attempt to cross-examine and badger his own witness.

Mr. DENMAN.—I think I can conceive what he wants.

WITNESS.—I will tell you, Mr. Flocker ought to have drawn the map so—

The COURT.—I think you may take your chair; roll the blackboard back there. It is very difficult to hear, and when we are all so near the witness he accommodates his voice to the person he is talking to, and the result is the reporter don't get it.

Mr. DENMAN.—Now, if the Court please, we will concede that at approximately the point indicated as Opening No. 7, 100 feet—

Mr. LEWERS.—Near the center of section 28.

Mr. DENMAN.—(Contg.) Township 39 north, range 48 east, is a lane, constructed about the first of April, 1911, through which runs the Tuscarora-Midas road and that lane was constructed by Mr. Osborne, or under his direction.

(Testimony of Drury P. Osborne.)

Mr. PLATT.—(Q.) Can you state whether or not the opening to which your attention has been directed is in section 28 of township 39 north, range 48 east?

A. I could not.

Q. Do you know whether it is in section 1 of that township and range, or not?

A. I can take the map that I have done that work by, and tell.

Q. But you don't know from independent recollection, do you? [73] A. No, I don't, but—

Q. But you are positive—

Mr. DENMAN.—Let him finish the answer.

A. But I am positive that I know where you have the opening marked in the red line is not in the right place.

Mr. PLATT.—(Q.) How many chains to the east, how many chains to the north, how many chains to the south, or how many chains to the west must that aperture be moved in order to make it accurate?

A. That is up to you.

Q. Is that your answer to that question?

A. I could not tell you, because I don't know.

Q. And yet you know it is not in the right place?

A. I know it is not in the right place, but how many chains one way or the other, I could not tell you.

Q. And that is your answer to the question?

A. Yes, sir.

Q. Now, I wish you would examine this map—

A. The Honorable Judge told me to take my chair.

The COURT.—Wait a minute. Just listen to the question.

(Testimony of Drury P. Osborne.)

Mr. PLATT.—(Q.) I wish you would examine this map, and more particularly the red line, from the intersecting point in section 28, running to a point designated as Opening No. 6, $\frac{1}{4}$ of a mile, and state whether or not, if you know, the Golconda Cattle Company built that fence?

A. They did.

Q. Now, you state that without looking at the map?

A. I can see it from here.

Q. Do you know when they built it?

A. Yes, we built that fence probably in, well, I could not say positively; we was constructing that fence in March and April, probably, had two or three gangs of men there.

Q. In what year? A. 1911.

Q. Do you know when it was finished?

A. Well, no; I could [74] not exactly say what date it was finished. I know that it wasn't finished, the fencing we were doing there, and the fence gang, I will answer that question: The fencing we was doing in that locality at the time this fence was built, I know that the fence, the fence gang wasn't moved away, or wasn't completed the first day of July, 1911; the fencing in that locality wasn't.

Q. I am asking you about a specific line of fence, and I ask you whether or not that fence was completed in the month of April, 1911?

A. Well, I could not say for certain whether it was or not; I might have had a gang of men there; I didn't stay up there; the men might have completed it in April, or might not have completed it until May.

(Testimony of Drury P. Osborne.)

I went up and lined out the fences on the north side of the dam, and put a gang to build the fences, and I didn't stay there and watch them every day to see where they was working.

Q. Well, you don't know, do you?

A. Could not say for certain it was; it might be and might not.

Q. Then you don't know, do you?

A. I don't know as I do know. The date, you asked me if I know the date; I don't know the date.

Q. Well, do you know about what time that portion of the fence to which I have directed your attention was completed?

A. I think it was completed before the end of April; yes, I think that fence was.

Q. Are you positive about that?

A. Well, there is the question about that. No, I ain't positive.

Q. You say you are not positive as to the exact date? Are you positive that portion of the fence was completed some time during the end of April?

A. During the end of April, yes, that might be.

Q. Might it be, or are you sure of it? [75]

A. You hammer at me—

The COURT.—Wait a minute.

Mr. LEWERS.—I object to this manner of cross-examining his own witness, and an attempt to confuse. The witness has answered fairly, and without any hesitation on all occasions, and the witness has labored under the difficulty that is to be regarded, of having trouble in hearing; but, notwithstanding, he

(Testimony of Drury P. Osborne.)

has not manifested any disposition to be adverse, hostile or unfair; and I think we will get along a lot faster if counsel will treat him in a proper manner.

Mr. PLATT.—I am obliged to talk loudly so the witness can understand me; that is why I am raising my voice; there is nothing heated about my questions; I simply want the witness to say whether he knows or does not know, and I am trying to get a categorical answer to my questions, if I can. If he does not know, I want him to testify that he does not know, and if he does know, I want him to say so.

Mr. LEWERS.—Then it does not make any difference whether it was the first or last of April; it is immaterial, anyhow.

The COURT.—Do you understand what he wants now?

WITNESS.—I understand. He first asked me if I could tell him positively when it was finished. I could not. Then he said was it approximately in the last of April; I told him it might be. Then he says you are positive it was completed in the last of April. There is the question back over again. I ain't positive, and he comes right back at me the second time.

The COURT.—(Q.) You don't know whether it was that month?

A. I do not. It might have been finished in April, Honorable Judge; it might have been finished in April, or it might not.

Mr. PLATT.—(Q.) Then you don't know whether it was completed in [76] April or not, do you?

A. Yes, that is it.

(Testimony of Drury P. Osborne.)

Q. Now, I call your attention to another part of the fence, beginning at the other side of the opening, and indicated upon the plat in the red, and will ask you if you know who built that fence, or that portion of the fence?

A. The Golconda Cattle Company.

Q. Now when was it built, if you know?

A. Probably in March.

Q. Of what year? A. 1911.

Q. Do you know when it was completed?

A. No, sir.

Q. Do you know about when it was?

A. Some time in March.

Q. I call your attention to that portion of the fence indicated in the black, and beginning where the red leaves off, and extending up to a point indicated upon the plat as the beginning of a gap, and will ask you if you know who built that portion of the fence? A. In the black?

Q. Yes. A. Golconda Cattle Company.

Q. When was it built? A. 1910.

Q. I call your attention to a fence indicated at the red, beginning where we just left off, extending in a northerly direction up to a designation on the map as "Opening No." blank; "300 feet, opening at Nelson's new fence line," and I will ask you if you know who built that fence?

A. Golconda Cattle Company.

Q. When? A. The first of March, 1911.

Q. When was it completed?

A. Well, now, that I could not say; that fence was

(Testimony of Drury P. Osborne.)

all under construction at one time. We commenced at the job where you started there, one crew was working one way, and one crew was working the other; when it was completed, I could not tell; it was completed some time in March.

Q. Do you know approximately when?

A. I say it was completed some time in March.

Q. You are sure it was completed some time in March?

A. I am pretty certain, March or—yes, March.
[77]

Q. I now call your attention to what is represented upon the map as the beginning of a fence shown to be indicated by a red line from a point on Nelson's fence, running in a general northerly direction, up to an arrow, indicative of the "Opening No. 5, North's fence to Noble's fence," and ask you if you know who built that part of the fence?

A. I do not.

Q. You did not aid in the construction of that fence? A. No, sir.

Q. Do you know whether or not it was built while you were in the employ of the Golconda Cattle Company? A. I never saw it.

Q. Never saw it? A. No.

Q. Do you know what general use was made of the lands by the Golconda Cattle Company, within the fence indicated upon the plat?

A. The territory? You mean between Rock Creek and Willow Creek?

Q. Between Rock Creek and Willow Creek, and

(Testimony of Drury P. Osborne.)

the lands within the fence indicated as North's fence and Nelson's fence?

A. What is the question, Mr. Platt, please?

Q. I ask you if you know what use the Golconda Cattle Company made of the lands within the fence which I have just described?

A. The Golconda Cattle Company made no more use of that lands—well, they made no use of it only in rodeoing and gathering and driving through it, just the same as any of our neighbors did.

Q. Well, what use did they make specifically, what use did they make of those lands?

A. Just as I told you.

Q. Did they ever graze in those lands?

A. Turn cattle in there; that is, cattle drifted in there same as anybody else's.

Q. Did the Golconda Cattle Company cattle ever graze within those lands during the time you were there?

A. In the spring of the year as the cattle went north, the Golconda Company's cattle, part would go in that country, part one [78] way and part another, and they drifted in through that country, just the same as any other cattle.

Q. Indiscriminately over the country?

A. Yes, sir.

Q. What kind of land generally is within that enclosure?

A. Well, that is a barren country, without any water whatever in that inclosure, outside of the Company's land on the creek. The Company's land

(Testimony of Drury P. Osborne.)

on the creek has water; outside of that that ridge country is a barren country, good for about two months. Tom Nelson starts in at Rock Creek, and lambs through that country up in April and May, and gets up in his fields in April and May; he uses it for lambing; there is no water on it any place outside of the Company's lands on the creek.

Q. You are sure that inclosure is used—

Mr. DENMAN.—One moment. Object to the word “inclosure.”

Mr. PLATT.—I use it advisedly, I think the witness knows what I mean.

Q. You say the lands within the fences which you and I have both described, are good for at least two months in the year?

A. Two months in the spring.

Q. For grazing purposes?

A. For sheep only; that is, sheep only, for that part of the country. Yes, sheep only, you might say.

Q. Could cattle or horses possibly graze over those lands for two months of the year?

A. Yes, they would exist there.

Q. They would get along there, wouldn't they?

A. Oh, yes.

Q. Now you say Nelson runs his sheep, or has run his sheep into this inclosure?

Mr. DENMAN.—Object to the word “inclosure.”

Mr. PLATT.—(Contg.) For a period of two months during the year, occasionally?

A. I will explain that, Judge, if you will let me.

(Testimony of Drury P. Osborne.)

The COURT.—Wait. Whenever the lawyers make an objection, wait.

Mr. DENMAN.—I object to the question on the ground the word “inclosure” is used.

The COURT.—Can’t you use some other term?

Mr. LEWERS.—Say Government land.

Mr. PLATT.—That is not what I mean; I mean all of the land within that fence.

The COURT.—Well, I shall not be misled by it.

Mr. LEWERS.—The danger is this; it may appear in the record hereafter that the witness referred to that as an inclosure.

The COURT.—Speak of it as the land between Rock and Willow Creeks.

WITNESS.—That would include patented lands of other people the same as Government land, would it?

The COURT.—Yes.

Mr. PLATT.—(Q.) Now, how often have you seen cattle, stock of any kind or description whatever, sheep or horses belonging to the Golconda Cattle Company grazing upon any of the lands represented in the white upon this map? A. In the white?

Q. Yes.

A. Well now, just the white. That is supposed to be the Government land, is it not?

Q. Yes.

A. Well, I suppose I have saw Golconda Company’s cattle, and other people’s stuff in there, every year more or less, in the spring of the year all the

(Testimony of Drury P. Osborne.)

time I was in the employ of the Golconda Cattle Company.

Q. What was the Golconda Cattle Company's stock, horses or sheep doing in there?

A. Well, they was just like anybody else's; they was turned loose probably on the river 15 miles from there, and drifted right up in there, and went right in on them creeks there to the water. [80]

Q. Were they grazing upon these lands represented in the white?

A. Well, I suppose they would take a bite or two as they went through, if they could find it.

Q. Do you know, as a matter of fact? I don't want any suppositions. Do you know, as a matter of fact, that cattle, horses, sheep and other stock belonging to the Golconda Cattle Company grazed and fed at any time during the year upon the lands indicated in the white upon the plat?

A. Well, I never stopped to see whether they was eating, I naturally supposed they was, same as anybody else's cattle; I didn't take the time to watch whether they was or not.

Q. For how many years can you state positively that the stock of the Golconda Cattle Company herded and grazed upon the lands to which your attention has been directed?

A. Now, "grazed on the land," I don't know, Judge, just how to take that. Golconda Cattle Company's stock, cattle, sheep, or horses never stopped and camped at anything that is on the white; they might have drifted through; the Company's stock

(Testimony of Drury P. Osborne.)

would go up Rock Creek, camp on Toejam, and lamb on Toejam; and Nelson would use all of the Willow Creek and Siawappe country in there, he has a right in there and nobody ever disputed it, I guess, for 20 years.

Q. Who gave Nelson a right in there?

A. Stockmen's rights, and respect for your neighbor.

Q. Do you know who gave Nelson any rights in there?

A. He had a right among us, any right that stockmen in any country has certain lines that they respect as neighbors in grazing stock.

Q. What lines were respected here as between Nelson and the Golconda Cattle Company? [81]

Mr. DENMAN.—I cannot see the relevancy of this examination. The question is whether or not on a certain day there was an inclosure which the Government prohibits under a certain statute, and I cannot see the relevancy of this. We have admitted the ownership of the land in there; we have a description of the fence as it is claimed to be to this point; we have everything before the Court that can determine in the Court's mind whether or not that fence should be down; and I cannot see the relevancy of this testimony we are going into, and I don't see the bearing on the case.

The COURT.—I supposed the purpose was to lead up to the use, if any, that was made of this white land between Rock and Willow Creek by the Golconda Cattle Company. That is the only purpose I can

(Testimony of Drury P. Osborne.)

see; but instead of asking the question directly he has been trying to lead the witness to it. Now, the rights of Nelson, he had no legal right in there, as I understand it, and I don't know that it is necessary to go into that matter. He had a right that is respected, as the witness says, among stockmen; they sort of apportion the country out among themselves, and it was a law among themselves, and if they respected it, it was all right, and if they did not respect it, there was no law which would compel them to.

Mr. PLATT.—If the Court please, there is another angle concerning cases of this character, and while I don't deem it is necessary to establish by proof the fact that there was an exclusive ownership and control and manipulation of lands alleged to be inclosed, or that there was an intent upon the part of the defendant company to exclude others from grazing their cattle upon the land, yet at the same time I believe that any testimony which tends to throw light upon an exclusive ownership, or a claim of right asserted to Government lands, as alleged in this bill of [82] complaint, is competent testimony in a case of this character.

Mr. DENMAN.—To what issue?

Mr. PLATT.—Upon the issue to an asserted claim of right to the exclusive use and control of the lands alleged to be inclosed by the fence, in this bill of complaint.

Mr. LEWERS.—You allege that as a part of the necessary foundation to your case.

Mr. PLATT.—I expressly stated, if the Court

(Testimony of Drury P. Osborne.)

please that was not my contention. I contend if the Government proves in a case of this character that there was an unlawful inclosure maintained, namely, an inclosure maintained by this defendant Company inclosing Government land, that that of itself, irrespective as to whether it was exclusive or not, constitutes a violation of this law. But I do say that questions of intent have been considered by some courts, and questions of exclusive ownership have been permitted as a part of the issues raised in cases of this kind in order to enable the Court to understand whether there was a claim of exclusive right, which is simply an aggravation of the offense.

Mr. DENMAN.—Do you contend it would make any difference about putting up the fence or taking it down, this is an equity suit, whether or not there was an exclusive ownership in there? I am not talking about a criminal case now, but in an equity suit, is it your contention that it makes any difference?

Mr. PLATT.—There is a respectable line of authorities upon the question of intent in equitable actions, I believe the weight of authority is the other way, as I expect to argue to your Honor at the proper time. It has been held in the case of the United States against Johnson that there is a question of intent involved even in a civil suit, and it is for the purpose of meeting [83] cases of that character that I am trying to ascertain the asserted claim of right to an exclusive ownership of the lands alleged to be enclosed. I state to your Honor frankly, as I expect to argue in the future, that the weight of

(Testimony of Drury P. Osborne.)

authority is the other way, and that the intent need not be disclosed in an action of this character, either in a criminal or civil suit.

Mr. LEWERS.—We withdraw the objection.

The COURT.—Your question also goes to the extent of the use that the Golconda Cattle Company has made of these lands, whether it has been an exclusive use, or used it in connection with other people?

Mr. PLATT.—Yes, your Honor. I think your Honor is entitled to that testimony. Not that it is necessary for the Government to prove that, but in order to meet every angle of the case, I believe it is material testimony. I submit I have shown in the question, and during the examination that this is a hostile witness.

The COURT.—Let me ask the question. (Q.) Did the Golconda Cattle Company make any use of that land?

A. None at all; the white land, none at all, never claimed it.

Q. Did anyone else ever make any use of it?

A. Nelson has used that land, and been respected, ever since the Golconda Cattle Company bought Squaw Valley, and had that,—Sibbles and Savage, when I went there they told me to respect it, never to try to crowd Nelson out of his range rights, and I never did.

Q. How far west did Nelson use that land?

A. Nelson commenced right at the point where the lane leads through, commenced right on there with his lambs, go up about a mile and a half to the first

(Testimony of Drury P. Osborne.)

jog in the fence, come up to the [84] dam, right at the dam, go up there and camp, then use that country from there all up and down the dam, up Siawappe, around his field, Noble's field, and around his place; he has used that for the last 20 years for his ground, nobody has bothered him; the company has never turned no stock in there, and never claimed no right in that open ground; from myself, I know, and more than that, they handed it down,—Mr. Sibbles and Mr. Savage, I was foreman when Sibbles was manager, told me to respect them rights, and that is the way it is to this day.

Q. The question I asked you is, how much of that land they have used; as I understand from your answer, Nelson has used all of the land east and north of the road, which leads from Midas through that big field?

A. East and north, yes, approximately, and directly right up the creek probably a half a mile; we came out from the Toejam Creek probably a half a mile, and lambed; and Nelson came down after us, didn't come out in the hills at all, came half a mile from the creek. We lambed north, we would take our sheep and put them across Toejam, and let them drift into Rock Mountain.

Q. But all of your sheep lambed west of Toejam?

A. Well, Toejam almost runs—yes, the bulk of our sheep.

MR. DENMAN.—Do you refer to—

A. (Intg.) The bulk of our stuff, while I was

(Testimony of Drury P. Osborne.)

superintendent all lambed west of Toejam and Rock Creek.

Mr. LEWERS.—That would be outside?

The COURT.—To the west.

WITNESS.—I will point to it on the map. Now, here is Toejam (indicating), here is Rock Creek runs on away up into this country on top of Rock Creek and Tuscarora Mountain, we commenced to lamb in here (indicates) what is called Six Mile, we start in right here on Six Mile, and I go onto Trout Creek and go on to Ford [85] Creek, so on up to Noble's fence, there we respect Noble; Noble would lamb out here, we respect him.

Q. Do you use any land south of Rock Creek?

A. Yes, we use the point of land south of Rock Creek, between Toejam and Rock Creek, we use probably, as I say, about a half a mile wide from Noble's fence, half a mile wide right along on Toejam; that is on the water, we camp on the water. Nelson has no water, that is the reason he commences on this country here, and starts right up and drops his lambs this way, and comes on up here; he lambs about fourteen thousand ewes in that territory, and works them up to his country right in here (indicates).

The COURT.—That is all.

Mr. PLATT.—(Q.) Do you know of any sheep belonging to the Golconda Cattle Company grazing upon the Government land, as indicated upon the plat?

A. In there (indicating)?

Q. Yes.

(Testimony of Drury P. Osborne.)

A. No, sir, not since I was superintendent.

Q. You never saw any sheep in there at all belonging to the Golconda Cattle Company?

A. Not where you are pointing; as I say, right along the creek.

Q. Did you ever see any sheep upon any part of the land indicated on the white upon this plat, and within the fence line, belonging to the Golconda Cattle Company? A. In the fall—

Q. What is that?

A. Let me explain to you. In the fall, probably, when we came down—

The COURT.—He has asked whether you ever saw any there. If you would answer that yes or no, we would understand a great deal better.

A. I don't want to, I want to explain why I would answer yes.

Q. Explain that later. Answer yes or no, you have seen them or have not seen them. [86]

Mr. DENMAN.—Then you can explain your answer.

A. I will say yes to that question. I started in to explain why I say yes.

Mr. DENMAN.—You can go ahead and explain.

WITNESS.—Have I a right to explain, Honorable Judge?

The COURT.—Yes, if you will be brief about it.

A. We came down in the fall, sometimes we would bring dry sheep, come down the St. John's road with dry sheep, drop in there in the dam, hold them there by the dam where they would get water, maybe cross

(Testimony of Drury P. Osborne.)

there a mile or so from the dam, or cross the dam south, coming down the Tuscarora road there, we would bring them down to the ranch and separate them, and take them to the southern country. We don't stop there, we camp there maybe one day in a place, coming down, maybe move four or five miles a day, we will camp as we are coming down, camp with them sheep there as we are coming from the Squaw Valley ranch going to the Rock Creek ranch, as we go to the southern range in Austin.

Mr. PLATT.—(Q.) As I understand, the sheep of the Golconda Cattle Company as they are being herded south, graze upon some of the lands represented by the white on the plat?

A. Just the same as all the other sheep men, they come down the trail, and they graze.

Q. You understood that question, didn't you?

A. Yes.

Q. Your answer is what?

A. My answer is that they graze approximately, one way from the trail, to the other; any stockman will understand that.

Q. State whether or not you know approximately the distance from what is represented as opening No. 1 to opening No. 4 upon the plat.

Mr. LEWERS.—The plat will speak for itself, will it not? [87]

A. Well, it would be probably in the neighborhood of 8 miles.

Mr. PLATT.—(Q.) State whether or not you know that prior to the month of May, 1911, there

(Testimony of Drury P. Osborne.)

were any openings in the fence between Opening No. 1 and Opening No. 4, a distance which you say of 8 miles?

A. Well, Mr. Platt, what do you constitute an opening?

Q. Were there any gates, or were there any—

The COURT.—Gaps in the fence.

Mr. PLATT.—Were there any gaps in the fence?

A. There was gates.

Q. How many gates were there from Opening No. 1 to Opening No. 4? A. Two wire gates.

Q. Where were they located?

A. One of them was located close to the corner of section 9, I can't tell you with the map, right here (indicates), it is close to the corner of section 9; and the other was right opposite, below Hot Spring, right opposite a dam in Rock Creek.

Q. Do you know what section the dam was in?

A. I do not.

Q. How big an opening did these two gates make?

A. Well, the gates would be 32 feet, just the distance of one post, the wire gate made a difference of one post.

Q. They were swinging gates?

A. They were not swinging gates, a wire gate don't swing; same as any stockman puts up a bar; to open it up, bring it back and take the posts from the wire, and bring it back.

Q. Those are the only two gates you know of in that distance of 8 miles?

Mr. DENMAN.—At what time?

(Testimony of Drury P. Osborne.)

WITNESS.—In the spring of 1910, you say.

Mr. PLATT.—That is, up to the month of May, 1911. A. Up to May, 1911?

Q. Yes. [88]

A. There was no opening outside of them gates. There was that gate at Rock Creek, and them two down the line, yes.

Mr. DENMAN.—You don't include the month of May; that is up to the first of May?

Mr. PLATT.—Up to the first of May.

Mr. LEWERS.—The 31st, when you filed your suit.

Mr. PLATT.—(Q.) Well, when, if you know of your own knowledge, were there any additional openings made in that fence, if at all?

A. Well, there was, yes. There was an opening made in there in May or in June.

Q. Well now, which was it? A. It was in June.

Q. It was in June, was it?

A. I think it was in June.

Mr. DENMAN.—Are you sure?

Mr. PLATT.—Now, when in June, if you know?

A. Well, probably along about the 10th or 12th, somewhere that part.

Q. You are talking pretty low.

A. I ain't afraid to talk loud to you, either.

Q. This is for the stenographer's convenience.

A. I say about the 10th of June, somewheres along.

Q. How do you fix the dates as being about the 9th or 10th of June?

A. An order came to me to make some openings in

(Testimony of Drury P. Osborne.)

the fence so stock could drift through along about that time, and I made it.

Q. Who gave you those orders? A. Mr. Kent.

Q. What Kent do you mean? A. William Kent.

Q. Well, what official position, if any, did he hold with the Golconda Cattle Company?

A. I suppose he is Congressman, they say he is.

Q. I am not asking you that. What official position did he [89] hold with the Golconda Cattle Company, if any?

A. I suppose he is president; I never see him sign his name as president of the Golconda Cattle Company.

Q. In what manner were these instructions given to you?

A. They was sent from Washington.

Q. Was it a written communication? A. No.

Mr. LEWERS.—You are better able to furnish that information; it was done at the request of your department.

Mr. PLATT.—If the Court please, that is uncalled for. The information I have is not testimony.

The COURT.—If counsel asks the witness a question, if it is not a proper question, make an objection; and if it is a proper question, the witness will answer.

Mr. PLATT.—(Q.) What kind of a communication was it?

A. I think it was a telegram.

Q. From whom did the telegram come?

A. The telegram came to Mr. Petrie of Golconda.

Q. And by whom was it signed?

(Testimony of Drury P. Osborne.)

A. I never saw it.

Q. How do you know then that the instruction came from Mr. Kent, the president of the Golconda Cattle Company? A. Mr. Petrie told me so.

Mr. DENMAN.—I move to strike out the testimony regarding the communication of Mr. Kent, on the ground it is hearsay.

Mr. PLATT.—I think it is a proper motion. I am trying to get the information, if I can.

The COURT.—It may be stricken out.

Mr. PLATT.—(Q.) Who is Mr. Petrie?

A. At that time Mr. Petrie was living in Golconda; I don't know as he held any title whatever.

Q. Was he employed by the Golconda Cattle Company? A. That I could not say. [90]

Q. Did Mr. Petrie give you instructions about the 9th or 10th of June then, to make these other openings in the fence?

A. He told me over the telephone that he had a telegram, or something, from Mr. Kent to make these openings.

Q. Why did you observe the instructions of Mr. Petrie, if you didn't know who he was?

A. I have had many a second-handed thing handed to me, and obeyed it.

Q. Was it your custom at that time to receive instructions for work upon the ranch from strangers?

Mr. LEWERS.—To which we object, if the Court please, that this entire line of interrogation is improper and irrelevant to any issue in this case. It is obviously based upon hearsay testimony, which

(Testimony of Drury P. Osborne.)

was stricken out by consent a few moments ago, and what bearing it has on the issues in this case, I don't know. If they desire to go into that question, counsel has in his possession, as I have already stated, ample information, without trying to get it second or third hand, as it appears from this witness.

Mr. PLATT.—I have not such information. The information which this witness has given me is the first information of the character I ever received.

The COURT.—I assume your purpose is to show by what authority these openings were made?

Mr. PLATT.—Precisely.

The COURT.—You may go on and question him, if you wish to do so. Even though you had that information in your possession, [91] I do not know whether the Court could compel you to resort to that information, rather than to take this. I think you are at liberty to prove your case in any way you see fit, provided you are within the rules of evidence; and if you see fit to prove that by this witness, I cannot prevent you.

Mr. LEWERS.—Our objection was on the ground it was purely hearsay, and based on hearsay testimony, stricken out by consent. This witness has testified as to his receiving information from Mr. Petrie concerning a telegram. That was stricken out by consent. Now, the examination follows along that line, and obviously it is based on evidence no longer a portion of the record, and we object to it on the ground it is hearsay.

The COURT.—That was stricken out; the contents

(Testimony of Drury P. Osborne.)

of that telegram were stricken out, and the fact that Mr. Kent sent it, because that is hearsay. But it is in evidence that they did open this fence; that he received orders to do so from Mr. Petrie. He testifies that he don't know what Mr. Petrie's title was. Now, Mr. Petrie undoubtedly gave orders which this witness respected, and I do not see why it is not perfectly relevant and proper if this witness knows, for him to testify why he obeyed Mr. Petrie's suggestion. If you know that, it is proper testimony.

Mr. PLATT.—Read the question.

(The Reporter reads the question.)

A. It was not.

Q. Why then did you observe the instruction given you by Mr. [92] Petrie?

A. Well, I will tell you why if you—I will explain it to the Judge so he can see it. I had resigned my position, and Mr. Petrie was supposed the first day of July to take my position; and when he had the orders come from Mr. Kent for me to open the fence, Mr. Petrie acted the gentleman, and told me that he had orders from Mr. Kent for us to open them openings, and I obeyed for that one reason, Mr. Petrie's orders.

Q. Do you know whether or not Mr. Petrie was employed in any capacity by the Golconda Cattle Company?

A. I do not, only a supposition with me, I had resigned.

Q. Do you know who took your place?

A. I don't think anybody did.

(Testimony of Drury P. Osborne.)

Q. Do you know who afterwards performed the duties which you performed? A. Yes.

Q. Who was that? A. Three or four of them.

Q. Was Mr. Petrie among them? A. He was.

Q. How do you know that he was?

A. Well, I introduced Mr. Petrie into the business.

Q. Upon whose instructions did you introduce him into the business? A. My own.

Q. Do you mean that you took instructions from yourself?

A. To show him, and to turn my business over, part of it, to him, and afterwards when I left, he divided up what I was doing amongst two or three.

Q. Who told you to turn the duties of your office, or a part of it, of your business, over to Mr. Petrie?

A. Who told me?

Q. Yes. A. I told myself.

Q. Did you have any authority from the Company for so doing? A. I did not.

Q. Did anybody tell you that Mr. Petrie was going to succeed you? A. Yes. [93]

Q. Who told you that? A. Mr. Kent.

Q. Do you mean the President of the Golconda Cattle Company? Now, what did Mr. Kent tell you about Mr. Petrie succeeding you?

A. I don't know as I have to answer that question.

Q. Well, it is up to the Court.

A. I will leave that to the Judge.

The COURT.—You can answer just what he said to you with reference to putting Mr. Petrie in your place. If he talked to you about anything else, we

(Testimony of Drury P. Osborne.)

don't want it. Just simply what he said about Mr. Petrie taking your position.

A. I resigned. I had a telegram from Mr. Kent, saying Mr. Petrie was in charge, full charge, and there is why I turned it over.

Mr. PLATT.—(Q.) Then you received a telegram direct from Mr. Kent, that Mr. Petrie was in full charge? A. Yes.

Q. And it was upon that telegram that you turned your business over to Mr. Petrie?

A. No, sir, I had told Mr. Petrie two weeks before that, I told him if there was anything he wanted to do, or wanted to attend to, to go ahead, that I would resign the first day of July and then he would have full control, and any new work he wanted to do, he had a perfect right to go ahead, but up to the first of July I was the king pin.

Q. Then who, if you know, made the other openings in the fence, or that portion of the fence which you have just described, after the 9th or 10th of June, 1911?

A. You mean up to that point you speak of up there?

Q. Yes.

A. I don't know as there is ever any more openings in it, I don't know of any.

Q. I call your attention to Opening No. 3 upon the plat, Opening No. 4, and will ask you if you know when those openings were made?

A. That opening number is a gate, ain't it, Mr. Platt? [94]

(Testimony of Drury P. Osborne.)

Mr. DENMAN.—No, it is 100 feet; it says “Opening, 100 feet” on the plat.

A. I don’t know nothing about it.

Mr. PLATT.—(Q.) You don’t know anything about Opening No. 4 and Opening No. 3, as designated there? A. I opened No. 3 myself; I opened No. 3.

Q. When did you do that?

A. Along about the 10th of June, maybe.

Q. What year? A. 1911.

Q. And, as I understand your testimony, you made that opening upon instructions given you by Mr. Petrie?

A. Well, instructions given to me by Mr. Petrie from Mr. Kent.

Q. How about Mr. Petrie, you had turned over the duties of your particular office?

A. I had not at that time.

Q. Was Mr. Petrie at that time employed by the company? A. I don’t know.

Q. Oh, you don’t know? A. I do not.

Mr. LEWERS.—I submit, that has been asked and answered several times.

Mr. PLATT.—I am endeavoring to get the facts.

A. Well, you are getting the facts just as they are.

The COURT.—Don’t argue. It seems to me that is pretty thoroughly understood, that he was in control himself, up to the first of July, were you not?

A. Yes.

The COURT.—And whatever he did then in obedience to what Mr. Petrie told him, was because he deferred to Mr. Petrie as the future manager of the

(Testimony of Drury P. Osborne.)

company, and if there was new work to be done, that he carried out his wishes.

Mr. PLATT.—If your Honor gets that view of the testimony, I do not desire to probe the witness any further.

The COURT.—That is what I understand, and I think that is about the fact, is it not?

A. How is that, Judge? [95]

The COURT.—Well, never mind, we will read the testimony.

Mr. PLATT.—(Q.) Do you know anything about Opening No. 6 and Opening No. 7, Opening No. 8, Opening No. 5, and an opening designated without a number, but showing in red “300 opening at Nelson’s new fence line”?

A. Yes, sir.

Q. Do you know when those openings were made?

A. Well, approximately, yes.

Q. Well when, approximately?

A. Well, what one do you want to know, Mr. Platt, first?

Q. Well, Opening No. 8, down here near Ivanhoe Creek.

A. Well that was right along the first of June maybe, about the same time, a day or two maybe one way or the other; I don’t know which one was first, the one on Rock Creek or Willow Creek, right along the same time.

Q. Who was in charge of the men who made that opening?

A. I can answer that question just the same as I did the other; that proposition was just the same as the other.

(Testimony of Drury P. Osborne.)

The COURT.—(Q.) That is, you were in charge of that work up to the first of July?

A. The first of July.

Mr. PLATT.—(Q.) Then to facilitate the hearing, the last mentioned openings to which I have called your attention, were made in pursuance of the instructions which you had received from Mr. Petrie?

A. Oh, no, some of them wasn't; the one that you speak of first was.

Q. I guess I cannot facilitate the hearing. I will ask you another question. I will ask you whether or not the Opening No. 8 just below Ivanhoe Creek, was made pursuant to instructions which you received from Mr. Petrie?

A. It was from Mr. Kent; the orders came from Mr. Kent to Mr. Petrie, and he telephoned them over to me. [96]

The COURT.—(Q.) Do you know whether those orders came from Mr. Kent or not?

A. I do.

Mr. PLATT.—(Q.) Now, state whether or not the Opening No. 7 was made pursuant to the same instructions. A. It was not.

Q. Do you know who made that opening?

A. I do.

Q. Who did? A. I did.

Q. Do you know when the opening was made?

A. Well, the opening was made—

Q. Well, you stated some time in June, didn't you?

Mr. LEWERS.—Just let the witness answer, if you please.

(Testimony of Drury P. Osborne.)

Mr. PLATT.—(Q.) Well, when was the Opening No. 7 made?

A. It was made about the first of April.

Q. Opening No. 7 was made you say about the first of April?

A. That is the opening in the fence, according to the way the fence is actually in existence to-day, was made about the first of April; but the opening where you have it on your fence does not exist.

Q. That is, that is your opinion?

A. I know it.

Q. I don't think it is necessary to thrash that out again. When was Opening No. 6 made, if you know?

A. On the red line or the old line?

Q. On the red line.

A. Well, that was made along in probably the latter part of March; that is, it never was made, it never was fenced up, never was fenced up.

Q. What never was fenced in?

A. The Opening No. 6 that you speak of in the red line.

Q. Do you mean to say that the red line about which I have questioned you does not represent a fence in that vicinity upon the plat?

A. You went all over that once before, and I told you. You are talking about a fence now, and you asked me a question about an opening. [97]

Q. And you answered me about a fence?

A. I didn't; you were talking about an opening, and I said there never was no fence existed across the opening.

(Testimony of Drury P. Osborne.)

Q. Oh, then, I understand you to say that the fence extended up to a point— A. Yes, sir.

Q. (Contg.) —upon the west side of the opening, and then you began the fence again upon a point on the east side of the opening?

A. No, sir, I did not. I finished the fence down one way, one gang finished the fence one way, and one the other way, consequently they would finish both of the ends at the same time.

Q. I think I understand it now. Then you ran the fence up to a point which represents the west side of the opening, and you started another fence near Nelson's fence, and ran southerly to a point, which represents the easterly side of the opening?

A. That opening was always open; that is the only way you could answer that question.

Q. In other words, you did not build a fence straight through, and tear it out again?

A. There was never no fence there, it was always an opening.

Q. You say that was built when?

A. About the latter part of March some time.

Q. When was the opening near the Nelson fence, when was that opening made, if you know?

A. It never was closed; never was no opening to be made.

Q. When was the fence shown in the red line, and apparently fencing in the gap indicated in the black, when, if you know, was that fence completed?

A. Which fence do you have reference to; the red line or the dark line?

(Testimony of Drury P. Osborne.)

Q. On the red line.

A. I think it was built the first of March, 1911.

[98]

Q. It was completed about then?

A. No, it wasn't completed, it was being under construction along the month of March.

Q. Well, when do you think that portion of the fence which closed up this gap was finished?

A. That gap never was closed, on the red lines.

Q. I repeat the question: When do you think this fence which, according to the designation upon the plat, closes up the gap represented by the black, when was that fence completed, if you know?

Mr. DENMAN.—Object to the question. The red line does not show the gap was ever closed.

Mr. PLATT.—If the Court please, it does show the closing of the gap and it shows the fence was extended further north of the gap, and there was an opening made there; as a matter of fact, it does close up the gap.

WITNESS.—I will answer that question, Judge. It never was closed, the red line, he is speaking of the red line, it never was closed.

Mr. PLATT.—If the Court please, I don't want to discuss with the witness.

The COURT.—(Q.) There was a fence built, was there not?

A. There was a fence built in the first place.

Q. Wait a moment. There was a fence built along there in which there was a gap, which you say never was closed?

(Testimony of Drury P. Osborne.)

A. There was a fence built there, designating the red line that shows a gap, that never was closed.

Q. When was that fence built?

A. That fence was built the month of March, 1911.

Q. Tell as near as you can when it was finished.

A. Well, that fence, that continuous fence, down to this gap No. 6 that he speaks of, we commenced at the jog; that fence up to that gap was probably finished the 10th or 12th of March, up to that gap on the [99] red lines, but the fence down the other way, somewheres in the month of March—oh, down the other way it wasn't March, March or April, the best I can recollect.

Mr. PLATT.—It is after 4 o'clock, but there is just one other question.

The COURT.—I would like you to get through with this subject.

Mr. PLATT.—(Q.) I call your attention to what purports to be a designation of a fence in red, beginning at the Nelson fence, and running in a northerly direction to an arrow point, and will ask you if you know who built that fence?

Mr. DENMAN.—He has testified to that already, and said that he did not know.

Mr. PLATT.—(Q.) You say you don't know?

A. I do not.

Q. As I understand it then, that portion of the fence was not built during the time you were in the employ of the Golconda Cattle Company? A. No.

Mr. PLATT.—I think that is all for the present.

(Court adjourns until Thursday, March 7th, 1912,

(Testimony of Drury P. Osborne.)

at 10 o'clock A. M.) [100]

Thursday, March 7th, 1912, 10 A. M.

DRURY P. OSBORNE, direct examination continued.

Mr. PLATT.—(Q.) Mr. Osborne, do you know how many head of sheep, cattle, or other stock, the Golconda Cattle Company herded, grazed or fed upon any of the lands within the so-called inclosure as shown upon the map, in the year 1910?

Mr. DENMAN.—Object to that on the ground there has been no fencing shown to have existed prior to the month of September, 1910, and this question covers that whole year.

Mr. PLATT.—I think it may be modified to that extent. I withdraw the question, if the Court please. I don't care anything as to the amount of stock grazed prior to any of the times involved in the complaint, that is, for the purposes of this examination. I withdraw the question.

Q. Can you state how many head of sheep, cattle, horses, or stock the Golconda Cattle Company herded, grazed or fed within the fence upon this plat represented in the black?

Mr. LEWERS.—Just a moment. Of course it is understood that all of this is subject to our general objection that it is not within the issues raised in the pleadings. I would like to have that understood so as not to interrupt at all times.

Mr. DENMAN.—We further object on the ground it is incompetent, irrelevant and immaterial, as a large portion of that land inside the fences belonged

(Testimony of Drury P. Osborne.)

to us, and we had a perfect right to graze.

Mr. PLATT.—So far as that is concerned, it can do the defendant no harm for this witness to testify as to stock-grazing upon the lands of the company; and it is certainly a proper question as a preliminary question. [101]

The COURT.—You may go on subject to the objection.

Mr. LEWERS.—And it is understood it is subject to the exception as well?

The COURT.—Is this confined to the time subsequent to the dates mentioned in the pleadings?

Mr. PLATT.—It is confined, if the Court please, to the time after the construction of the co-called fence represented upon the plat in the black, and before the construction of any part or portion of the fences represented on the plat in red.

Mr. DENMAN.—We raise the further objection, then, that under no theory of the case can it be considered an inclosure. Of course your Honor will consider that later on.

The COURT.—That is the important question, as to whether it is an inclosure or not; that is the question in the case.

Mr. DENMAN.—So we object on the ground, so far as this fence is concerned, with these wide openings here, there cannot be any question as to whether that first alleged inclosure is an inclosure.

Mr. PLATT.—I submit there would be no use at all for this testimony, or any testimony, if we had satisfied the Court at this time that this was an inclosure.

(Testimony of Drury P. Osborne.)

I take it that the purpose and object of this testimony is to bring forth certain facts, in an effort to aid the Court in arriving at a correct conclusion as to whether it is an inclosure.

The COURT.—You may proceed.

Mr. DENMAN.—We note an exception.

Mr. PLATT.—Will you read the question.

(The Reporter reads the question.)

A. None, only travelling through with the sheep; no cattle or horses, or anything, was herded, or anything of that kind in there. [102]

Q. Do you mean to say there were no cattle, horses, sheep, or other stock, herded, grazed, or fed upon the lands held in private ownership, and represented in the blue upon the map?

A. Well, very little down—there is a field down to the lower end of the company's land, commencing where Willow and Rock Creek joins, and we turned saddle horses and loose horses in on the company's actual field, but none on the Government land, or none above, except just travelling through back and forth, would be all.

Q. Now, travelling through back and forth, I wish you would indicate on the plat where these horses, cattle and sheep travelled through back and forth.

A. That would only be as stock went in and went out.

Q. Just a moment. Did you understand my question. I wish you would indicate upon the plat just where cattle, horses, sheep, or other stock travelled back and forth? A. Do you want that?

(Testimony of Drury P. Osborne.)

The COURT.—Yes.

A. Well, stock would come in from the Golconda side, that is, west, come in from the west, come through the land into this country here, come through that part. Now, that stock that came here, part of it would drift north to the Winters country, and part come through the lane, and drift in here; also part come in here, and drift out through this lane, and drift to the Winters side. Also stock would come in from this side, the south side, most of the stock would drift from here up to the Ivanhoe, come in here by the reservoir, and drift in; or come in and drift in through Siawappe; some drifted in through the St. John's, through what is called the Bull camp; through this country through here (indicating). There is openings in there that you haven't here. Also drift through that country to the Rock Creek and Tuscarora side. [103]

Q. As I understand it, the cattle would come through the south, in some instances, and drift in through here? A. A portion of them would.

Q. What do you mean when you say "drift in through here"?

A. Come along here for water from the low hills, drift in here to water in Willow Creek, and drift in along here; that creek is all on the outside of the company's fence.

Q. I didn't ask you where the locations of the creeks were; I want to know after the cattle got in through these openings where they got out, whether as a matter of fact, they did not drift upon any of

(Testimony of Drury P. Osborne.)

these lands represented on the white.

A. They would drift across them lands, and on through this country in them openings, and pass on to the Tuscarora country.

Q. As I understand it, they came through the gaps from the south, and drifted clear across these Government lands; is that it?

A. Some might go up here a piece, and come out again.

Q. And some might have gone clear through?

A. Yes.

Q. What year did you notice that?

A. I have noticed every year I have been there, except the first years I was there, that country was all open, both sides, of course they drifted all through that country then.

Q. In other words, when the country was all open, the cattle drifted aimlessly all over that country?

A. Just the same as they do.

Q. After it was closed up they didn't drift so much over that country, did they?

A. No, of course they could not, it stands to reason they could not.

Q. It stands to reason they could not. As I understand it, after these fences were up, there was not so much drifting of cattle over the Government land, was there? [104]

A. Never seen much difference. In the summer time, after the spring of the year, cattle were turned out; our cattle, Russell's and different ones, drifted up that way; there was as many cattle in that field

(Testimony of Drury P. Osborne.)

from that country in the spring of the year as before there was any fence around that, so far as the drifting is concerned.

Q. How many head of the Golconda Company's cattle do you remember to have seen drifting across the Government land, represented upon this plat within the so-called fence, during the year 1911?

A. Well, I could not say how many, what number; I have seen a few; I wasn't there much of 1911; you see I was just there when the cattle went through in the spring, and went up in the spring, could not say how many, or anything about it, or how many of anybody else's, as far as the exact number.

Q. Can you approximate how many head of cattle of the Golconda Cattle Company grazed upon these Government lands within this fence during the spring of 1911?

A. I believe there was 300 head of the Pitch Fork went through that country, or maybe 400 went through there in the spring of 1911.

Q. Went clear across the country?

A. Yes, and clean over to the Walker country.

Q. Did you notice any sheep during the spring of 1911 go across that country?

A. Whose sheep?

Q. Golconda Cattle Company sheep.

A. None of them.

Q. Now, Mr. Osborne, during the time that you were superintendent or foreman of the Golconda Cattle Company, from what direction generally did the cattle, sheep and other stock come, in order to get

(Testimony of Drury P. Osborne.)

within the fence, as indicated upon the plat, and to graze upon the Government land?

A. Well, the sheep principally all came from the west. [105]

Q. The sheep principally came from the west. How about the cattle?

A. The cattle, the bulk of the cattle, that is, the bulk of the cattle that drifted through that country, came from the south.

Q. Did any cattle or sheep come from the north?

A. Only in the fall.

Q. Only in the fall. And how about the east?

A. A few of Fairchild's cattle might have drifted through that side.

Q. Well, do you know whether any of Fairchild's cattle ever drifted through that side? A. I do.

Q. Where was Fairchild's ranch?

A. Fairchild's ranch was on the Tuscarora side; Fairchild's cattle runs up in this Bull Camp country.

Q. Did you ever see any of Fairchild's cattle in the inclosure? A. I have.

Q. When?

A. Not in that inclosure, because there is no inclosure, but I have saw them on that land.

Q. How do you know there is no inclosure?

A. I know it.

Q. You are giving that as your opinion?

A. No giving about it, I know it.

Q. Where did Fairchild's cattle, or by what means did Fairchild's cattle get into this so-called inclosure?

A. They came in from the Bull camp this way, on

(Testimony of Drury P. Osborne.)

from Tuscarora right down through this country, down Toejam, to the north or south fork of Hot Creek, in this country here, in the fall when the snow drove them out.

Q. Point on the plat, will you, just through what apertures they came, if you know.

A. Could come in any of those points, through any any time, up to the spring.

Q. Let us have this: They would come through an opening represented on the plat as opening number blank, 300 at Nelson's fence line they would come through that opening, would they? [106]

A. Could come through it.

Q. Ever seen any?

A. I have not been up in this country here since that spring, but before that I have gathered Fairchild's cattle in this country, and took them to the Squaw Valley Ranch.

Q. Across this Government land? A. Yes.

Q. And you are sure that you yourself gathered them, and took them across the Government land through this opening?

A. Not from that opening, the opening wasn't through here.

Q. From the point indicated by this opening upon the plat? Is that true? A. Yes.

Mr. DENMAN.—In order that I may understand your contention, you don't claim you have shown that this fence here existed at any time prior to the filing of your bill?

Mr. PLATT.—Oh, no. But my effort is, if the

(Testimony of Drury P. Osborne.)

Court please, to find the point of access, if I can, by Fairchild's cattle upon these lands represented in the white; and, as I understand it, Mr. Osborne, the point of access to these Government lands was at the point which you have indicated here, namely opening number blank?

A. The point would be a locality here (indicates); this country in here, I know that country; this here is where they would come down in the fall, off the high mountains, find them all around here, and down here; I have taken "25" cattle, Pitch Fork and Fairchild's cattle out of there in the winter, out of two feet of snow, and taken them down on the trail, almost to Spring Valley to that point where the quaking asp is; that is why I say I have taken cattle out of that.

Q. They came out of the high mountains; what high mountains did they come out of?

A. Some pretty high mountains back here about 8 miles, about 8 miles from this point (indicates), 6 to 8 miles, back in here is some pretty high mountains, just before you break down to Tuscarora. [107]

Q. They came from high mountains, northeast in some high mountains, and came down around in the neighborhood or locality of this point indicated in the red?

A. They might have come 25 miles north from the same point the same way.

Q. I don't care anything about suppositions. You stated definitely that the stock and cattle came from a point 7 or 8 miles northeast of this plat, from some

(Testimony of Drury P. Osborne.)

high mountains, down and around to a point in the locality of this red point which I have indicated.

Mr. DENMAN.—I object to that on the ground it does not state the witness' statement. The witness stated they came through here (indicates), and ran his pointer over Toejam Mountain, and all through this side of the alleged inclosure.

Mr. PLATT.—I will leave it to the witness and to the Court.

The COURT.—It is simply what the witness states. Your repetition must depend upon just the language of the witness. Now, if there is any uncertainty about it, we will have Mr. Osborne go over that again. Now, I will tell you what I want; you are very frank, and give a great deal of information, but I want you to confine yourself exactly to the question; don't answer anything more, don't tell what you did or did not do, or what you thought; but simply tell where the cattle came into this so-called inclosure from the east. Now, if you can go there on the map and show, do so. Just name the points.

A. This particular question, to answer that particular question, I answered it once before, that I had taken cattle that had come out of the mountains up in this country; I had taken—

The COURT.—Wait a moment. You are telling a lot of matter that we don't want. All I want to know is the place in the fence now. If I ask you where you came into this house, you say [108] you came in through the door down in front; you don't tell that you came through the postoffice, or

(Testimony of Drury P. Osborne.)

what you did this morning. Just tell the particular point that you came in. If you can tell where the cattle came in on the east side of that inclosure onto that land between Willow Creek and Rock Creek, do so.

A. I could not tell you; I found the cattle at this point right in here, taking them out.

Mr. PLATT.—(Q.) What point?

A. From this point (indicating), point right there, out into the Squaw Valley Ranch.

Q. You took the cattle from the point—in order that the record might show it—from the point indicated by a red arrow mark, extending out of a designation upon the plat, “Opening No. 300 opening at Nelson’s new fence line,” do I correctly indicate the point?

A. Well, yes, now I will explain.

Q. You have not been asked a question, but you may explain.

The COURT.—If that is the only point that is an answer to the question. If there are other places where they came through, give them.

Mr. DENMAN.—Where they can come through, your Honor.

The COURT.—Or where they did come through.

A. I don’t know just hardly how to answer a question of that kind. In a stock country proposition they might come from several different localities, as far as that is concerned, where they gather in a snow-storm, or anything, cattle drift into willows.

The COURT.—We will say that is the only point

(Testimony of Drury P. Osborne.)

you know that they came through. Now, you may name points where they could come through on the east side. That don't depend on where the cattle came through, I just want to know where they could get through that territory.

A. Besides that point?

The COURT.—Yes. [109]

Mr. DENMAN.—Start at the north.

Mr. PLATT.—I object to counsel designating or telling the witness where to start from.

A. I will answer the Court. They could come through from anywhere, from right in here, anywhere from right along in here (indicates on plat), clean over to this point here, up till Nelson built his fence this spring; they can come from any of that country into this country. This is Mr. Noble's field here (indicates). Now, that fence is down, from where it comes north of Toejam, can come from any of this country, down through here, any time of the year.

The COURT.—Take your pencil and just mark the point on the east, and then the point on the west. Put it down definitely. You say this country here, and that country there, that don't mean anything. Put the place down so it shows definitely.

A. Where they can come in?

The COURT.—Yes, where they can come in. (Witness marks on plat.) Now, put a mark around there so we will know just what you mean. (Witness marks on plat.)

The COURT.—That don't answer the question

(Testimony of Drury P. Osborne.)

exactly. Here is a long fence line (illustrating on blackboard); along the east boundary, you say from here to here, and here to here, I don't know what you mean. Now, there must be a place here that is opening; it is an opening from there, say, to there; there is a place 150 feet through which they could come; now perhaps there is another place along here, it may be two miles, that they could come through. You see what I mean?

A. This represents a fence?

Q. You say it represents a fence, I don't know what it represents. Here is the side of this territory here, some of it is fenced and some is not. Now there are places here according to your [110] statement, where they can enter, there are places probably where they cannot enter. Now, I wish you would simply show us where those places are, and how long they are, if you can.

A. Well, I don't know the distance. I know that distance.

Q. What was that? A. Three hundred feet.

Q. Is there a distance there 300 feet?

A. I suppose there is, that is my orders.

Q. Well, here is a place 300 feet. Now is there any other place?

A. Well, the last time I was in this country here to know anything about it, there was something like two miles.

Q. Two miles right in here (indicating)?

A. Yes.

Q. Now is there any place right here (indicates)?

(Testimony of Drury P. Osborne.)

A. No.

Q. Just those two places, one 300 feet, and one two miles? A. Yes.

Q. Is there anything else?

A. Not anything more.

Q. Anything down here (indicating)?

A. Down here there is a half a mile.

Q. Right about here (indicates)?

A. Right about that point.

Q. Now is there anything along here, any opening? A. One right here (indicates).

Q. How much is that?

A. It is 100 feet in length.

Q. Is there anything else?

A. One right here (indicates).

Q. How much is that?

A. I suppose that would be about 300 feet, might not be that.

Q. 100 or 300? A. 100.

Q. Where is the next one? A. The lane.

Q. How much is that?

A. Well, that is probably 150 foot, on the average.

Q. Do you mean the width of the lane or the opening in the fence?

A. This is the field here (indicating), there is a lane right through here, this may be 150 foot at this point, and over at [111] this end might not be 100 or 200, and in the middle be 400.

Mr. PLATT.—I don't want to re-examine the witness on this point again. I just want to call your Honor's attention to one thing. Many of these open-

(Testimony of Drury P. Osborne.)

ings, you will understand, were made after the complaint in this case was filed, so of course they would have no direct bearing.

The COURT.—(Q.) Where is the next one?

A. The next one is here (indicating).

Q. How much is that? A. About 100 feet.

Q. Where is the next one?

A. This one (pointing), the last I knew anything of that—I see they have it marked 100 feet—it was a gate the last I knew of it.

Q. About how wide? A. A four-foot gate.

Q. Where is the next one?

A. The next one is right in this—right here (indicating).

Q. How much was that? A. Probably 500 feet.

Q. What was the next one?

A. Well, that is all I remember of at the present time.

Q. Now, you gave this 300 foot opening; is that the end of Nelson's fence?

A. That is from the company's fence to Nelson's fence, an opening between the two; Nelson's fence is here, and that lays up there, and that is 300 feet there.

Q. That is marked opening blank. That is where the 300 feet is?

Mr. PLATT.—Mark it "A," if the Court please.

The COURT.—(Q.) At Opening No. A, 300 feet. Then Opening No. 6, one-half mile. At Opening No. 7, 100 feet; Opening No. 8, 100 feet. Opening No. 1, 100 feet. Opening No. 3, 100 feet. Opening No. 4,

(Testimony of Drury P. Osborne.)

a gate, 24 feet. Opening No.—there is no number to this one, either. I will mark that B. At Opening “B,” 500 feet. Opening No. 5.— [112]

A. The last time I knew anything about 5, it was about two miles.

Q. Two miles.

The COURT.—Those pencil marks can be erased, if you wish. (Referring to points marked by the Court on the plat.)

Mr. PLATT.—(Q.) You say you were never up in that country indicated upon the plat as the “Toe-jam Mountain”?

A. Never up there?

Q. Yes. A. Been there a thousand times.

Q. You have been there a thousand times?

A. Yes, I expect I have been there a thousand times.

Q. Oh, you have been all over this country, then?

A. I know it just as a book.

Q. What did you mean when you said you had not been up there?

Mr. LEWERS.—If the Court please, I submit the witness did not say that.

Mr. PLATT.—Well, I am trying to find out.

A. I have not been there since Mr. Nelson built his fence, that is what I told the Court.

Q. When did Mr. Nelson build that fence?

A. I don't know when Mr. Nelson built that fence; I have heard Mr. Nelson built that fence, but since that fence has been there I have never saw the fence; I don't know that he built it, naturally supposed that he built it.

(Testimony of Drury P. Osborne.)

Q. Now, can you tell me what the distance is from the southwest quarter of section 5, township 40 north, range 49 east, across the company's land diagonally, in a straight line, northeast, up to the base of the Toejam Mountain?

Mr. DENMAN.—Object to that question on the ground it is not shown to be the company's land.

Mr. PLATT.—I thought it was admitted in this case, if the [113] Court please, that all the lands in blue belonged in private ownership to the Golconda Cattle Company?

Mr. DENMAN.—No, nothing of the kind.

The COURT.—No, he admitted it was private land, but did not admit it was all company land. Is that correct?

Mr. LEWERS.—Nelson owns land up in there, you know.

Mr. PLATT.—(Q.) I wish you would designate upon the plat, if you know, the land owned and held in private ownership by the Golconda Cattle Company. A. I could not.

Q. Why can't you?

A. Well, because I don't know the numbers of all their land.

Q. Do you know any of them?

A. I don't know as I could tell you any numbers of them; I knew the locality of some land; I knew the land down in Squaw Valley Ranch, and around the dam. Now, up in that country where you speak of, the company has most of the land, and Nelson has land, and different ones has land; several differ-

(Testimony of Drury P. Osborne.)

ent ones, Noble and Smith, and Alex Boram has lands, several different owners has land.

Q. But you did testify on yesterday, didn't you, that the company maintained and controlled, and, as I understood you to say, built the fence, beginning from a point upon North's fence, running clear around this so-called inclosure, up to and including a point at Nelson's fence?

A. They own that land with that fence around it.

Q. They own that fence?

A. They own the land where that fence runs.

Q. They own all the land where that fence is?

A. Where that fence crosses.

Q. There is no question about that, is there?

A. To the best of my knowledge of my field-notes and my orders, that they own every foot of that land.

[114]

Q. When was the last time that you saw any cattle come through the enclosure represented on the map as "Opening No. 5 North's fence to Noble's fence 1 $\frac{1}{4}$ miles"?

A. March, 1911.

Q. March, 1911. Whose cattle were they?

A. They was Pitchfork cattle.

Q. What do you mean by "Pitchfork cattle"?

A. Golconda cattle.

Q. Golconda Cattle Company cattle?

A. Golconda cattle.

Q. Were they being driven over?

A. They was beef stock, gathered stuff.

Q. Gathered stuff. Do you know from what point or from what direction they came?

A. Yes.

(Testimony of Drury P. Osborne.)

Q. Where?

A. The Walker place on Rock Creek.

Q. Where is the Walker place on Rock Creek?

A. It is not on that map.

Q. In what direction is it? A. North.

Q. Point it out relatively, the direction, will you?

A. Well, it would be east of north of that No. 5 opening.

Q. Cannot you designate upon the blackboard relatively, with your finger, about where? A. Yes.

Q. I wish you would do so.

A. The Walker place would be in the locality about there (indicating).

Q. Where I have marked a cross?

A. Yes, in that locality.

Q. Now, in what direction did the cattle come?

A. Well, they came south with gathered beef, that is higher.

Q. I wish you would explain from the map just where you brought the cattle through, if you know.

A. Well, there was cattle brought through two or three different points, as far as that is concerned.

Q. Well, if there are a dozen points, will you please point them out on the map. [115]

A. I cannot point out the spot or what 40 they came through.

Q. Can you point out approximately where they came through? A. Yes.

Q. I wish you would. A. Through opening No. 5.

Q. Can't you come a distance less than a mile and a quarter? A. I might not.

(Testimony of Drury P. Osborne.)

Q. If they came diagonally in a southwesterly direction, in the manner in which I am indicating upon the blackboard and map, they would come through the aperture, wouldn't they, between the Toejam Mountain and the line representing a section line?

A. The Toejam Mountain, I don't see any Toejam Mountain that looks like Toejam Mountain on there.

Q. I wish you would answer my question.

Mr. DENMAN.—That is a fair answer.

A. I brought them through that locality of opening No. 5.

The COURT.—Could you tell—

A. We brought them through—

The COURT.—Wait a moment. Could you tell with reference to Toejam Mountain where you brought them?

A. We brought them on the north slope of Toejam Mountain. What you have as Toejam Mountain, that is that big mountain up in there, but we brought them on the north slope of that big mountain.

Mr. PLATT.—(Q.) How far down the slope did you herd them?

A. I could not answer that question.

Q. Why not?

A. Because I didn't pay enough attention when driving cattle through any country to see just what part of the mountain I am on.

Q. As a matter of fact, don't you know cattle were driven over the side of the slope which was the least steep? A. No.

Q. Do you know, as a matter of fact, that they

(Testimony of Drury P. Osborne.)

were driven right over the summit of the mountain?

A. No. [116]

Q. They were not? A. No.

Q. How do you know that?

A. I told you we drove them over the north slope.

Q. How far down the north slope?

A. That I could not state.

Q. You don't know? A. No.

Q. What time before that time did you ever see any cattle come in from the same direction about which you have testified?

A. Oh, we rodeoed up in that country in 1910, we drove a lot of cattle, and came back through that country, all through that country, as far as that is concerned, north, east and west.

Q. Whose cattle?

A. Whose cattle? That is a hard question to answer. There was a dozen different men's cattle.

Q. Did you herd them? A. I did not.

Q. Who brought them down through there?

A. The rodeo outfit.

Q. What outfit was that?

A. Spanish Ranch, "25," Pitchfork, "S. L.," Hammond's, Desmond's.

Q. Where did they come through there?

A. They came through all that country up there.

Q. What country?

A. All that northern country, drive through anywhere up in that country, and shove them down to the flats.

Q. Were you there when they were driven

(Testimony of Drury P. Osborne.)

through? A. I was not.

Q. How far away were you?

A. I met them probably 6 or 7 miles from there.

Q. Point on the map, will you, about where you met them.

A. Oh, I met them just above the Tuscarora road, where it crosses into Willow Creek from Rock Creek.

Q. I wish you would indicate on the plat where you met them. (Witness indicates point on plat.)

Q. In section 26?

A. Or in section 36, could not say. [117]

Q. You might have met them in section 36 of township 39 north, range 48 east?

A. I pointed to where, about, I met them, now, you can figure out the section yourself.

Q. That is about where you met them?

A. Where I pointed.

Q. And is that the first point you met them?

A. That day, probably, it was.

Q. Now, how do you know positively that those cattle came over the Toejam Mountain, or from that vicinity? A. How do I know?

Q. Yes.

A. Because they bring them that way every year; that is the trails.

Q. How do you know that?

A. I know because my men working for me told me, and I know where they was rodeoing, and there is no "how" about it; I know which way they bring them every year, so there was nothing to it.

Q. How do you know they bring them that way

(Testimony of Drury P. Osborne.)

every year; did you ever see them? A. Yes.

Q. Where did you ever see them?

A. I was with them.

Q. How long ago?

A. 3 or 4 years ago, the first fall I was with the company; I was up in that country when they brought cattle through.

Q. Were all these fences up at that time?

A. No.

Q. They were not, were they? A. No.

Q. Well, as a matter of fact, Mr. Osborne, you were miles away from the Toejam Mountain, weren't you, when you first saw these people whom you said drive their cattle through that opening?

A. Well, I know where they came.

Q. You have heard my question?

A. I was at that time, yes.

The COURT.—Read the question.

(The reporter reads the question.)

A. Yes. [118]

Mr. PLATT.—(Q.) Are you familiar with any fences owned and controlled and maintained by the Golconda Cattle Company, which at any time were built along the boundary line of the land marked in blue, which boundary line is next or nearest the Government land represented in the white? A. Yes.

Q. I wish you would indicate on the plat where those fences, are, if there are any?

A. This fence here (indicating).

Q. Just a moment. You say "this fence here," you mean the fence which is indicated upon the plat

(Testimony of Drury P. Osborne.)

beginning at the intersection of what is known as North's fence, running in a westerly direction up to a point upon the east side line of the northeast quarter of section 34; is that true?

A. This is supposed—

Q. I don't care about suppositions.

A. The way I want to answer the question is this, if the Court please. I don't know who owns these five 40's south of the fence; it may be Government land; I don't know who owns those five 40's along there, maybe six 40's,—say five 40's—I don't know who owns them. That is all the fence I know of, except on the inside. You mean on the inside, don't you, not on the outside?

Q. I mean on the inside, yes, not on the outside.

A. That is all I know of that actually touches Government land; if that is Government land, it runs along the line of the Government land.

Q. Now, do you know who owns the land indicated in the blue, just north of the fence line, which you have just indicated? A. Yes.

Q. Who owns that?

A. Golconda Cattle Company.

Q. You are sure about that? A. Yes, sir.

Q. Now, as a matter of fact, Mr. Osborne, when was this line [119] of fence about which you have just testified, run along here?

A. Well, it was posts set in 1909.

Q. Posts were set in 1909. Where did it used to run? A. It used to run right there.

Q. Did it always run there?

(Testimony of Drury P. Osborne.)

A. Always run there.

Q. All the time? A. Yes.

Q. Prior to 1909?

A. Oh, no, the posts was set in 1909, the wire wasn't put up until 1910.

Q. Was there any fence there prior to 1909 at all?

A. No.

Q. Now, as I understand it, that is the only fence owned and controlled by the Golconda Cattle Company, or line of fence, which is situated next to the Government land?

Mr. DENMAN.—On the inside?

Mr. PLATT.—Of course.

A. Well, unless it would be this new fence I built this spring, I don't know who owns this land at all; I know the company owns all the land below that new fence; now, this land, I don't know who owns that; that is the piece that comes through the lane out here, and then out here, and across Willow Creek. If this is Government land, that is the fence; outside of that new fence there crossing there, I know of no other that touches Government land.

Q. You mean outside of the fence indicated in red upon the plat, beginning at opening No. 1, and ending at opening No. 8.

A. Yes, that fence was built this spring, in 1911, from this point out to that point, 33 down to 4, through 4, and across to 2, across Willow Creek, and joined another fence.

The COURT.—(Q.) That is the fence from point No. 1 to opening No. 8?

(Testimony of Drury P. Osborne.)

Mr. DENMAN.—8 in red ink.

Mr. PLATT.—(Q.) Now, Mr. Osborne, do you know of any land whatsoever indicated in the blue upon the plat, and held in private [120] ownership, which is completely inclosed by a fence?

A. Yes.

Q. I wish you would indicate it.

A. Right here (pointing).

Q. Now, you say land in section 28.

A. Now, I am speaking, Judge, of what I know. I built this fence in the spring, came across here and came up here, the surveyor set all these stakes to this point, just before the first of July they was stretching this fence, and I left the first of July; I have never saw that since that, whether they completed this fence from this on up or not, but when I left there the calculation was to go right on. This part I know is fenced because I run the fence across up to this field when I left. Now, whether the Golconda Cattle Company has completed that fence to here, I don't know.

Q. Then the only complete inclosure of Golconda Cattle Company land about which you know anything, is that land near the so-called reservoir, as indicated upon the plat, and beginning at a point approximately in section 29—

A. No.

Q. Where does it begin? A. At this lane.

Q. Beginning at a point in section 28?

A. I think probably it did.

Q. Approximately section 28, and ending at what point?

(Testimony of Drury P. Osborne.)

A. Well, my survey, I had Mr. Taylor survey, my point commenced here; they was constructing this fence when I left the Golconda Cattle Company.

Q. You were engaged in constructing that fence, and it was your intention to run it to a point somewhere in section 36?

The COURT.—(Q.) That includes the reservoir, does it not, the one you are speaking of?

Mr. PLATT.—Yes.

Q. Now, I wish you would point out and indicate any other lands of the Golconda Cattle Company that are completely inclosed. [121]

A. Here (indicating on plat).

Q. That country represented upon the plat as being inclosed by a fence indicated in the red, running from Opening No. 1 to Opening No. 8, and joining at each opening with the fence represented as being on the outside of the lands represented in the blue; is that true? A. That is a field.

Q. Then you have two fields.

The COURT.—(Q.) Is that outside?

A. That is all under cultivation down below.

Q. Is the fence represented there as being on Government land? A. No, sir, on company land.

Mr. PLATT.—The fence is represented as being on the outside boundary of the lands indicated in blue, and held in private ownership. (Q.) Now, what other?

A. We had a field in Toejam Creek, about 120 acres or 100 acres; something like that; I came down here and ran down the creek, and ran across that

(Testimony of Drury P. Osborne.)

field I sowed in barley and potatoes.

Q. Then the only other inclosed field is a field of about 120 acres in the south half of section 33 of township 40 north, range 48 east?

A. Well, from that map—I could not say whether that is the exact 40's, it is in that locality.

Q. That is approximately, then, in your judgment, the location of that other field? A. Yes.

Q. Now, you are sure that those are the only three fields belonging to the Golconda Cattle Company indicated on the plat in the blue, that are completely inclosed by fences?

A. Well, yes, up to the time I left.

Q. And whatever other fences there are upon the plat around lands indicated in the blue, or owned by the Golconda Cattle Company, are just around one side of those lands? [122]

A. Yes. That is lands now that is owned by the Golconda Cattle Company; that is the way the question was, wasn't it?

Mr. DENMAN.—Yes.

Mr. PLATT.—I think that is all, if the Court please, for the present.

Cross-examination.

Mr. DENMAN.—(Q.) Mr. Osborne, you were asked on your direct—

The COURT.—Before you go on, in order that you may govern your cross-examination, if you see fit to, I think I shall allow you to discuss this question of accounting, and so on, before very much more testimony on that point comes in. I am afraid that is

(Testimony of Drury P. Osborne.)

going to occupy a good deal of time. If I was certain it would occupy only a very short time, I would adhere to the present rule allowing it all to go in and have that discussed at the end of the case, and I would prefer to have it that way, unless it is to occupy too much time. You can do just as you prefer.

Mr. DENMAN.—I see, your Honor. We will take up our examination of this witness, and then at 2 o'clock have that matter put down for argument.

The COURT.—You may as well finish this day. Do just as you like. If it is going to occupy two or three days to put that in, or a day or so, it is quite a saving.

Mr. DENMAN.—Of course our understanding is that an accounting is something to be referred to a Master. I think that is the usual procedure; of course, it is within the discretion of the Court.

The COURT.—I will hear you on that matter before very much more testimony is put in on that point. [123]

Mr. DENMAN.—(Q.) Now, Mr. Osborne, on your direct examination the Government asked you about your superintendency there, and I want to ask you some particulars regarding that. Who was the president of the Company?

A. Well, Mr. Kent was supposed to be.

Q. That is the man you refer to as Congressman Kent? A. Yes.

Q. And did you receive your orders from him, I mean in general? A. In general, yes.

(Testimony of Drury P. Osborne.)

Q. Is it not a fact that Congressman Kent ordered you to at no time inclose any Government land?

A. That is the fact.

Q. Is it not a fact—

Mr. PLATT.—I object on the ground it is improper cross-examination.

Mr. DENMAN.—You in direct examination tried to prove the relationship of this man to this corporation; I want to show what his agency was, what his orders were; what the entire relationship was between him and the corporation.

Mr. PLATT.—I think counsel has evidently forgotten as to just exactly what happened during that examination. The witness testified in response to my questions that he did not receive instructions direct from Congressman Kent, but that he was shown a telegram—

Mr. DENMAN.—I am not referring to that.

Mr. PLATT.—I am referring to his testimony upon that point. That he was shown a telegram, which, as I understood him, was sent to a Mr. Petrie from Congressman Kent, and that pursuant to that telegram, he went along and did certain things. Now, if the Court please, upon that statement made by the witness, the question was either withdrawn, or the objection interposed by counsel was sustained, upon the ground that what Congressman Kent told Mr. Petrie, and what Mr. Petrie told Mr. Osborne, was hearsay [124] testimony.

Mr. DENMAN.—That is not the point I am making, your Honor. The point I am making is this;

(Testimony of Drury P. Osborne.)

that this man on direct examination was examined as to his relationship with the corporation, and the authority he had to build these fences. Now, on cross-examination I want to go into the question of the authority he received, the nature of his agency, and in usual cross-examination method find out what his relationship was to the corporation. I surely can do that.

The COURT.—There is no doubt about your doing that. But you asked a leading question, if I recollect right as to whether Mr. Kent himself had ever authorized him to build a fence, and what his orders were about building fences on Government land?

Mr. DENMAN.—Yes.

The COURT.—Now, as I look at it, it is more a question of what he did, than what the orders were. I don't think that merely because the orders were not to put any fence on Government land, and not to make any enclosure of Government land, that I am bound to accept their interpretation of what means an inclosure. Now, there is going to be a very decided difference between counsel as to what an inclosure is, and even if they ordered these men not to put the fence on, and not to inclose this land, if, in spite of the orders the land was inclosed, and the company has allowed it to remain there, and it is a violation of the law, it strikes me it is a very serious thing, even if it was done contrary to orders originally. But you are at liberty to go into this cross-examination to ascertain what his relations

(Testimony of Drury P. Osborne.)

were to the company, but when it comes to exonerating Mr. Kent, if you go into it for that purpose, it seems to me that is a part of your defense. [125]

Mr. DENMAN.—Let me see if I make myself clear.

The COURT.—The witness was not asked, as I recollect it, whether Mr. Kent had directed him not to fence public land or not, he was simply asked as to whether he had received instructions, and where he had received his instructions as to the construction of certain fences.

Mr. DENMAN.—Certain openings.

The COURT.—Is that not a fact?

Mr. DENMAN.—On that end of the case I did not have that in mind at all. What I have in mind is this, that where testimony is offered on behalf of the Government to show intent, and that was their intention in offering certain evidence, that we can show the intent of the corporation by the statements of its leading officers, and if we can check that down right through, from the leading officers down to the lowest of the employees, we have shown the corporation intent. Now, we did not offer the evidence as to intent; our opponents have; they have offered considerable evidence to show intent. And, furthermore, in showing the relationship of this man—

The COURT.—Before you go onto something else, the relationship is all right, you need not argue that. What testimony do you point to as showing Mr. Kent's intent?

Mr. DENMAN.—No, the company's intent.

The COURT.—What do you show then with refer-

(Testimony of Drury P. Osborne.)

ence to the company's intent; what particular testimony there do you point to as showing that?

Mr. DENMAN.—The question of the exclusive occupancy of the interior of that land. Mr. Platt said there was a respectable line of cases supporting it.

The COURT.—Whatever he said as to the occupancy. Now, what testimony as to the other. This is as to the construction of [126] fences, the purport of your question that was objected to.

Mr. DENMAN.—Well, I should say that the construction of the fences would indicate what purpose the interior was to be used for, the space in between, I should think that would all bear on the matter.

The COURT.—The mere fact that he has asked questions as to the construction of a fence opens the door for you to introduce testimony as to what instructions the president of the company gave?

Mr. DENMAN.—Yes. It may be that the man may have gone outside of his authority. We don't know until we have cross-examined. It may be a frolic of his own.

The COURT.—Well, I think I will let you go into it. But the question as it is raised, I will allow other examination by the Government of the witnesses on that point, if they wish, as new matter brought out on cross-examination.

Mr. PLATT.—Your Honor will give me the benefit of an exception on the grounds stated in the objection.

The COURT.—I allow it simply because it is a

(Testimony of Drury P. Osborne.)

matter which is relevant at some stage in the case, and they can introduce that as a matter of defense. I don't think there is very much doubt about that, if the intent cuts any figure at all in the case, and that will be one of the questions to be argued.

Mr. PLATT.—I would like to hear that question read.

(The reporter reads the question.)

Mr. PLATT.—In order that the record may be straight, I move that the answer be stricken out for the reason I did not have an opportunity to object before the answer was in.

Mr. DENMAN.—We will consent that the objection appears before the answer. [127]

Mr. PLATT.—Upon the ground it is improper cross-examination, and the further ground it does not tend to prove any issue involved in the case; and upon the further ground that the instruction given by the president of the corporation without any foundation laid as to the source of the authority of the president of the corporation to give instructions, could in no wise bind the corporation, or could in no wise be testimony relevant to any issues involved between a corporate entity and the Government of the United States.

Mr. DENMAN.—This is preliminary; we will make the connecting link between Mr. Kent and the corporation, although I should think Mr. Platt would be willing to concede that to be a fact.

Mr. PLATT.—Concede what to be a fact.

(Testimony of Drury P. Osborne.)

Mr. LEWERS.—Mr. Kent's presidency of the company.

Mr. PLATT.—I am willing to concede and know that as well as one might know from hearsay that Mr. Kent is the president of the corporation; but I am not willing to concede that the president of any company may go on the street, or go to an employee, and say, you do this or do that, and by mere oral instruction bind the corporation.

Mr. DENMAN.—That is one method of showing the intent.

Mr. PLATT.—And I should also, as long as the question is to be permitted, like to question Mr. Osborne again.

The COURT.—I shall allow you to do that.

Mr. PLATT.—For the purpose of laying the foundation for another objection as to the nature of those instructions, if they were in writing I should like to see them.

The COURT.—(Q.) Did you get those instructions in writing?

WITNESS.—Not the instructions according to building these fences, that is where the question is wrong. [128]

Q. Where did you get the instructions?

A. I got the instructions from Mr. Kent through Mr. Petrie to make these openings in constructing these fences. He asked me the question about constructing fences. He asked me where I got authority for making these openings. I got that from Mr. Petrie. And constructing these fences, I got my in-

(Testimony of Drury P. Osborne.)

structions from Mr. Kent.

Q. Did you ever have any instructions directly from Mr. Kent; that is, did he speak to you in person, or send you a letter? A. By which?

Q. About either the openings or the fence.

A. Mr. Petrie had a telegram or a letter—

Q. Just wait a moment; I don't think you understand my question. A. No, I don't.

Q. You and I are talking together; I am talking to you personally; and if I tell one of your lawyers on the street to tell you something, and he comes and tells you, I am not talking to you, it is your lawyer who is talking to you. Now, I want to know whether Mr. Kent spoke to you directly at any time about these fences? A. He did.

Q. About the openings in the fences?

A. He did.

Q. Did he ever write you a letter about it, that is, direct to you and not to Mr. Petrie, but to you, that you received yourself?

A. I ain't certain whether it was about the openings or not.

Q. Well, did he ever write you about the fence, or telegraph you?

A. He has wrote to me about the fences, and other business, all the time I was superintendent. I got lots of my orders right direct from Mr. Kent.

The COURT.—Very well.

Mr. PLATT.—I would like to see that correspondence, if the Court please, if this testimony is to be permitted, it is the best evidence. [129]

(Testimony of Drury P. Osborne.)

The COURT.—Well, the telegram or letter would be the best evidence, that is true.

Mr. DENMAN.—(Q.) Now, my question I asked you was what Mr. Kent had said to you personally?

Mr. PLATT.—I object on the ground the time of the conversation has not been designated, the date of the conversation has not been shown, and the place of the conversation has not been shown; and that the proper foundation has not been laid.

Mr. DENMAN.—This is not an impeaching question. This question, your Honor, has reference to the question of intent, of user of land, not as to fencing.

Q. Did Mr. Kent as president of the company, not instruct you to do nothing to interfere in any way with the use of that Government land by anybody else, meaning the Government land between these creeks?

Mr. PLATT.—Without repeating my objection, I desire the same objection to be interposed to this question that I have heretofore interposed to a question of like character.

A. I don't understand the question.

Mr. PLATT.—As I understand it, the objection is overruled?

The COURT.—Well, yes, the objection is overruled, and the answer goes in subject to the objection, just the same as all this testimony.

Mr. PLATT.—And your Honor will give me the benefit of an exception on the grounds stated in the objection.

(Testimony of Drury P. Osborne.)

Mr. DENMAN.—Read the question.

(The reporter reads the question.)

The COURT.—Just the oral instruction. It has nothing to do with any letters or telegrams that you ever saw. I want to make this plain, and then if you don't understand it, ask the question. This is a conversation that occurred between you and Mr. Kent, [130] it is not anything that Mr. Petrie told you that Mr. Kent said, or that anybody else told you; it is not anything that he wrote you, simply what he told you in person when you and he were talking together.

Mr. PLATT.—I add the additional objection that the time and place has not been mentioned, so it would be impossible for the Government in cross-examination or otherwise, to meet the question, in the absence of time, place, or date of the conversation.

The COURT.—If this were an impeaching question he would be compelled under the rule to give the date and place, and the names of the persons who were present, but as I understand it, it is open to you to question him with reference to that matter as much as you like.

Mr. PLATT.—In order that your Honor may understand my position, my contention is that it is just as necessary for testimony narrating a conversation, whether it be impeaching testimony or otherwise, that the time, place and date of the conversation be indicated by the witness before the witness is permitted to testify as to the conversation itself.

(Testimony of Drury P. Osborne.)

The COURT.—That may be included as a part of the objection.

Mr. DENMAN.—Read the question.

(The reporter reads the question.)

A. Yes, the conversation was that I was to not have any, and not to claim any rights, title, or anything in or on that Government land whatever, nor to keep nobody from going in or out.

Q. Mr. Osborne, I want to ask you more particularly about these lands—and in order that your Honor may get what we have in mind, I want to make a statement of what I expect to prove by this witness.

The COURT.—Do you think that is just the proper thing before the witness. I think I will grasp your meaning. If you have [131] something you want to concede so as to shut off part of this examination, I will listen very gladly indeed.

Mr. DENMAN.—No, the situation is the other way; we desire to build up certain facts.

Q. Mr. Osborne, did you ever have any discussion with the president of the Golconda Cattle Company, or any of its officers, regarding the fencing of the lands of the company, and by that I mean all the lands owned in the vicinity of Dutton?

A. I have.

Q. When did you first have those discussions?

A. In December, 1908.

Mr. PLATT.—The same objection will go to all this line of questioning.

The COURT.—I presume you propose to bring out the orders?

(Testimony of Drury P. Osborne.)

Mr. DENMAN.—Yes.

The COURT.—I doubt whether the mere conversations would be of very much service to the Court.

Mr. DENMAN.—It was preliminary; that was all.

Mr. LEWERS.—We expect to follow with what was done pursuant to those.

The COURT.—Orders; but it seems to me conversation is purely hearsay. If there was an order given, that is a fact.

Mr. DENMAN.—I am going to show the intent of the company from the beginning of the fencing work, which ran over a period of about five years, during which time they fenced up their fields, one after another in succession, beginning below there, and worked into this territory.

Mr. PLATT.—I assume the Court does not take that as testimony?

Mr. DENMAN.—No, I am showing what my offer of testimony is going to be, but on cross-examination bringing out what the intent of the company was.
[132]

The COURT.—Is it necessary for you to go down below there four or five miles, to show what was done on other property of the defendant company?

Mr. DENMAN.—No, not to do that, but to show the intent of the company operating in that district.

The COURT.—To show their intent by what they did with other lands?

Mr. DENMAN.—Adjoining lands, connected with those lands by water and community of interest.

The COURT.—You may state just what that is.

(Testimony of Drury P. Osborne.)

I am convinced that would hardly have much weight with me, but I would rather you would just make a brief statement of it, and see whether counsel will admit it or not. I would rather you would make a statement of what you want to prove, briefly, with reference to other lands, and submit that to counsel; and if it is consented to, it can be considered something you could prove, without putting it in evidence.

Mr. LEWERS.—I want to make a suggestion in that connection. The purpose of the cross-examination is based upon the plat, which is already in evidence, which plat, taken by itself as it there stands, gives but a partial impression from which your Honor can determine the many essential facts going towards the intent and exclusive user, and so on, contended by the Government in their bill, and which they have sought to sustain. That is, that your Honor with that plat, or with the evidence based upon that territory alone, will get a very partial and incomplete conception of the reasons why the particular fences shown on this plat were constructed. It is practically the same as showing a nose on a man's face, without showing the face as to its fitting.

The COURT.—Let me ask you a question: Suppose the Government should offer proof, showing that five miles below here you had [133] put a tight fence without a gate in it, around five thousand acres of land, would you consider that testimony admissible?

Mr. LEWERS.—If the fencing of this upper part,

(Testimony of Drury P. Osborne.)

whatever fencing was done there, and whatever was contemplated, and was in course of being carried out, had a logical bearing from the standpoint of economical ranching on that lower part, yes. That is our purpose. We do not desire to have it appear that the situation is as outlined by the Government here. This is merely a portion of a single unit; we are not going in onto other units, that is not our desire.

The COURT.—I think I shall have to confine it within the limits of cross-examination. If you want to question about any territory, the question will have to be confined to this particular territory within the limits of cross-examination, it seems to me. I don't want to have this case go on so long, that is the objection. As I told you in the beginning, I am willing to hear any testimony you offer in good faith, provided it don't take up too much time, but with 30 or 40 witnesses here, and getting along as slowly as we do, I am afraid we are going to be a month; and also that we are getting in a lot of testimony that is not going to be of very much service to the Court. I think a great deal of this testimony will not be considered when the Court comes to write up its findings or statement of facts, if it concludes to make a written decision of the case. So far, I have gathered from this that certain territory there belongs to the Government, and certain territory belongs to the defendant; a fence has been erected along in certain places; there are certain openings, and cattle have been ranging in there, some neighbors cattle and some of the defendant's cattle, and that these openings are about of a

(Testimony of Drury P. Osborne.)

certain extent, and through these openings cattle can go; [134] that is about all so far that I have learned out of this case.

Mr. LEWERS.—Your Honor, I think, will be satisfied, and I am sure that counsel on the other side will agree, that there is no reasonable probability there will be any such number of witnesses actually used as have been subpoenaed here, that is, from the assurances we have received, I think there is no question about that. In fact, on the basis of that, we have sent for a number of our witnesses to be here immediately, on the expectation that the Government's case would close within a day or two; but I will state, your Honor, that the testimony which we now seek to elicit on the cross-examination is directly connected with the direct examination, and that we in the utmost good faith do believe that it is material.

The COURT.—I do not doubt that at all.

Mr. LEWERS.—And if it is not improper, I can, by simply exhibiting a map here to your Honor, indicate what it is we are contending. (Places map on board.)

Mr. PLATT.—I submit, if the Court please, if they want to start in their defense at this time—

Mr. DENMAN.—Oh, no.

Mr. PLATT.—(Contg.) I think probably the Government might as well permit them to do it. If they desire to introduce any plats, if they are proper plats, they should be introduced on their defense; and I do not propose to discuss with your Honor, or with counsel, anything relative to a plat which is not

(Testimony of Drury P. Osborne.)

in evidence, or which is a part of their defense, at this stage of the trial.

The COURT.—I think you had better ask your question, and I will rule on it.

Mr. LEWERS.—In answer to Mr. Platt, this is not offered in evidence. It is merely to illustrate our contention to your [135] Honor, as a part of the argument to your Honor, and Mr. Platt need not be needlessly alarmed as to our offering it at this time. It is merely to show that the ranch is directly connected with the portion that is on the original plat.

Mr. DENMAN.—I see what your Honor desires, and I will endeavor to build up my case through the questions, and get a ruling.

Q. Mr. Osborne, you testified regarding this fence here, running from T. 39 north, range 47 east, down to Opening No. 1. Is that fence an isolated fence, or is it a part of an inclosure to the westerly, which inclosure is inclosed on the east side by that fence?

A. That fence is the east, and part of the north of a field of 1600 acres, company land.

Q. When was that inclosure built?

A. That was built in the spring of 1909.

The COURT.—Q. Is that the inclosure south of the Midas road?

A. Oh, no, that is the Fraser Creek country; that is up in what is called the Fraser Creek country.

Mr. DENMAN.—It is right north of the Midas road here. Sketch in, if you will, this field of which that fence I have just described is the easterly boundary.

(Testimony of Drury P. Osborne.)

A. Well, I don't know as I could just exactly.

Q. In a rough way.

A. I could give the locality of it.

Q. In a rough way. (Witness draws on plat.)

Q. How far below "Opening No. 1-150" is it?

A. Oh, that is the lane, it comes to the lane.

Q. It comes to the lane, and forms the northern boundary of the lane in there? A. Yes.

Q. Now, I understand that you have fenced that inclosure somewhere around 33, on the north boundary. A. Yes, a small field.

Q. And you say you planted in there?

A. Barley and potatoes. [136]

Q. What preparations had you made to fence the land running from T. 39 north, range 47 east, around to North's fence on the northerly side of—or around Rock Creek and Toejam Creek?

Mr. PLATT.—Object on the ground it is improper cross-examination; on the further ground that any preparations made to do anything would not be binding upon anybody, and would not be evidence.

The COURT.—I will allow that question.

Mr. PLATT.—We note an exception.

A. We have the posts and wire at the Dutton ranch to make a field of that now.

Mr. DENMAN.—(Q.) How long ago did you get that wire?

A. Bought that wire about two years ago.

The COURT.—You need not go into that any further; there was no question about that in direct examination.

(Testimony of Drury P. Osborne.)

Mr. LEWERS.—The last part of Mr. Platt's direct examination was directed to the question particularly of not having put any fences on the south side of that land, for the purpose obviously of showing that there was a particular significance to be attached to the fact that there was only one fence there; and that opens that very question.

Mr. DENMAN.—Of intent.

Mr. LEWERS.—The questions asked by Mr. Platt were undoubtedly for the purpose of showing we had no such idea in mind as making a field up there anywhere. Now, on cross-examination we are entitled to complete that story as to what actually was done.

The COURT.—Very well, proceed; I will allow it.

Mr. PLATT.—We note an exception.

Mr. DENMAN.—(Q.) The same thing is true of all the balance of the company's land on those creeks?

A. My orders was to fence the fields, from 40 to 5,000 acres of [137] the company's land, to entirely close it.

Q. These fencing operations, enclosing field after field, have gone on for the last five years, have they not?

A. Four years, while I was with the company.

Mr. PLATT.—I move that the answer be stricken out, on the ground there was no testimony in direct examination of any field operations; the questions were directed primarily to the actual fields fenced, and not as to any field operations, or contemplated operations.

Mr. DENMAN.—There is something else referred

(Testimony of Drury P. Osborne.)

to aside from the fields, and that is a state of mind as showing the intent. If the intent was to bound all the properties, we can show that covered the other as well as this.

The COURT.—I think I will sustain the objection as to future operations.

Mr. DENMAN.—As to future operations.

The COURT.—Read the last question and answer.

(The record is read by the reporter.)

Mr. PLATT.—I was going to suggest to the Court, the question itself, the fencing operations, enclosing field after field. There is no testimony showing that field after field was enclosed, or any fencing operations enclosing field after field. He was interrogated as to the physical conditions of those lands, as to the inclosures.

The COURT.—I admit that is a very general question, and the answer is very indefinite indeed, but of course they take the testimony just as it comes.

Mr. DENMAN.—Q. Tell me what the character of land is that is owned by the company along these creeks, and that you have spoken of as the company land, in answer to Mr. Platt. What is [138] the character of that land?

A. It is all rich bottom land, except a few points that run around on the hills. The bulk of the land is all rich, heavy black loam land.

Q. Is there any of that black loam bottom land that has not been taken up in there, that you know of?

A. I don't know of a piece.

(Testimony of Drury P. Osborne.)

Mr. PLATT.—Do you mean by the Golconda Cattle Company?

Mr. DENMAN.—By anybody.

WITNESS.—By anybody. There is other people.

Q. You are familiar with all that territory in there, aren't you? A. I am.

Q. You have travelled over time and again this entire district in here, haven't you? A. I have.

Q. As a matter of fact, all this land not marked in blue, is simply rough sagebrush benches, is it not?

A. Rolling country.

Q. Rough or—

A. (Intg.) Not so very rough, no, just a rolling country, like rolling hills.

Q. What can you say as to the vegetation of it?

A. Good spring vegetation, for a couple of months in the spring of the year, for lambing time, that is all; in the fall just a little dry stuff growing here and there; and that little dry stuff that is left don't amount to much.

Q. Now, with regard to the cattle you have seen in there between these creeks since October, 1910, tell me the different brands and owners that have cattle in there, to your knowledge?

A. It is pretty hard to tell all of them, rodeoing there is quite a few.

Q. I am now talking about the cattle you have seen inside there; I am not asking how they got there; I am simply asking what cattle you have seen inside in that space between those creeks, since [139] October, 1910, different brands.

(Testimony of Drury P. Osborne.)

A. Well, I have saw come through there, gathered from that country on, and rounded up in there and separated, I have seen eight different irons.

Q. That is, you saw eight different irons of cattle that were roaming within the district lying between Rock Creek, Toejam Creek, Siawappe, and Willow Creek? A. Yes.

Q. Now, you say different irons, you mean by that owned by different persons? A. Different owners.

Q. Tell me the owners?

A. Well, the "25," that is Mr. Russell. "P. Bench" "Palo Alto" is Moffatt and Humphrey. The "S. L.," John G. Taylor's. Then there is the "C. S.," the Bliss Brothers. Then there is the "T. J.," the Hammond boys. And there is a "Bar Iron," John Desmond. Fairchild's iron, I don't know what they call it; it is a kind of square block with an iron on each end of it.

Q. Is it not a rolling-pin?

A. Yes, rolling-pin; well, say the "Rolling-pin." I would not say for certain that I saw any "Y. P's" that year. There is Desmond's, "C. S.," "Pitchfork"; then there is a horseshoe.

Q. That is another one?

A. "Horseshoe" is Cop's at Battle Mountain. There might be some other, but I know they was gathered that fall, of October.

Q. How about the spring of the following year, the same brands in the country?

A. Yes; when they turned out, the same brands would drift to their ranges, just the same principally, yes.

(Testimony of Drury P. Osborne.)

Q. Let me ask you about Toejam Mountain; is that properly drawn on there?

A. Well, it don't represent Toejam Mountain at all, the way Toejam Mountain runs, at all.

Q. Does it represent anything in there that looks like it?

A. It doesn't look like Toejam Mountain. [140]

Q. As a matter of fact, Toejam Mountain runs the other way, does it not?

A. The long ridge of Toejam Mountain runs the other way.

Q. Is it not a fact there is a space for a mile or a mile and a half in there, over any portion of which you can drive cattle?

A. Ain't any portion but what you can drive over the summit of Toejam Mountain with horses and cattle.

Q. Is it not a fact, many places you could drive a wagon into this country, going on beyond?

A. A few places.

Q. How about feed in there; is it not a fact that cattle would naturally graze right through this opening, out into the country beyond?

Mr. PLATT.—Object on the ground it calls for an opinion of the witness.

The COURT.—I will allow the question.

Mr. PLATT.—I note an exception on the grounds stated in the objection.

(The Reporter reads the question.)

A. Yes.

Mr. DENMAN.—Q. What is this country beyond,

(Testimony of Drury P. Osborne.)

—is it a high, mountainous grazing country?

A. Fine grazing country.

Q. Now, tell me, what is the—of course I know this is not necessary for this Court, but it may be on beyond—what is your natural summer range,—is it in the higher rather than the lower regions?

A. Summer time it is high altitude.

Q. What is the reason for that?

A. Well, better grass, and colder; better grass, the higher up you get the better grass country you get.

Q. How about the condition of the feed?

A. That is in an open range.

Q. This is an open range in here, it is?

A. Yes. [141]

Q. How about the condition of the feed between the point marked "Opening No. A," and North's fence, running to the northeasterly from there for about five miles?

A. It is just an ordinary slope from these low hills, an ordinary mountain slope, up some steep ravines, and nothing impassable for a buggy or wagon or sheep, or cattle, or anything else to pass over it.

Q. What is the condition of the feed in that country?

A. Bunch grass and sunflowers in summer time close to the mountain, up around the rocks, rocky spaces; have a kind of a sunflower, what we call a sunflower, weeds and such things, fine feed.

Q. Cattle range right up to the summit, and through those rocks? A. Certainly.

(Testimony of Drury P. Osborne.)

Q. Now, you have referred to a two-mile space running northerly and slightly westerly from this point marked "Opening No. A," and that apparently would include North's fence?

A. Yes; in that two mile, I am alluding to that two miles as when I was there last.

Q. How long ago was that?

A. That was last spring, probably in March, the first of March.

Q. What was the condition of North's fence at that time with reference to holding cattle?

A. North's fence ain't held cattle for years.

Q. How many years?

A. Not since I have been in that Squaw Valley country, five years.

Q. Why would it not hold cattle?

A. For probably a hundred yards at a place the posts has all rotted out, and fell down.

Q. By North's fence you mean this fence running from the easterly end of the medium or middle line in section 36, township 40 north, range 48 east, running from that point across over to the point of the arrow at opening No. 5? That is what you mean by North's fence? [142]

A. I don't think North's fence runs that way according to that map; I know it don't.

Q. Whatever fence it is between those two points is the fence you refer to as having these openings in it?

A. Yes. Where have you North's fence running, Mr. Platt, what locality?

(Testimony of Drury P. Osborne.)

Mr. PLATT.—You are talking to your counsel, now, and had better answer his questions.

Mr. DENMAN.—(Q.) That is the fence that has the openings in?

A. The Noble fence has the openings, every little piece it is down.

Q. That is a very old fence, is it not? A. Yes.

The COURT.—(Q.) Do I understand that Noble's fence is the one in which both of these openings exist; that is, the two-mile opening and the half-mile opening?

WITNESS.—No, he is speaking of Noble's fence being down, it is rotted, and fell down.

Mr. DENMAN.—I will bring that out, your Honor; I am going to come right across the country here through this territory.

Mr. LEWERS.—I would like the record to show that what is referred to as Noble's and North's fence is the same fence.

Mr. DENMAN.—This North's fence is also known as Noble's fence?

A. Yes.

Q. What other name has the fence?

A. Used to be North's fence, it is now Noble's fence.

Q. What is that field called in there sometimes?

A. Noble field.

Q. Has it any other name? A. North Ranch.

Q. What is the name Mike was calling it last night? Is it ever called the Walker field?

A. No, that ain't the Walker field; the Walker field

(Testimony of Drury P. Osborne.)

is a field that is fenced on Walker Creek. [143]

Q. Above there? A. Above there.

Q. Now, coming down from a point where the Golconda Cattle Company's fence used to join North's fence at the easterly side of section 36, as I understand it, as you came through along this fence to where it ends or turns to the north again, you say it is down in many places along there?

A. Probably from where it goes down into Toejam to where the Company's fence joins it, down to the Company's land, it is probably down four places.

Q. How large are the openings?

A. Some down 300 feet, some down probably a hundred.

Q. That has been the condition how long?

A. Four years.

Q. How old is that fence, do you know?

A. Built something in 1882 or 1884, or 1879, I don't know, somewhere along there.

Q. When you come to the westerly point—

Mr. PLATT.—(Q.) How do you know those fences were built in 1882 or 1884, or 1879?

A. I know it from Noble, and people who lived in that locality.

Q. You don't know of your own knowledge, do you?

Mr. DENMAN.—I will bring it out. (Q.) Does it appear to be an old fence? A. An old fence.

Q. Rotted down? A. Places rotted down.

Q. How old would you judge it to be by its appearance? A. Well, it looks to be 20 years old.

(Testimony of Drury P. Osborne.)

Mr. PLATT.—Appearance and knowledge, if the Court please, are two different things.

The COURT.—Well, it will go in that it is an old fence.

Mr. DENMAN.—(Q.) Now, at the westerly point of the arrow at opening No. 5, coming across to this opening marked “A,” there has never been to your knowledge any obstruction built by anybody [144] to your knowledge, between those two points, or lying to the north easterly from there?

A. None whatever.

Q. Now, what can you say as to the territory where you have drawn these pencil lines running into this territory in the interior here, between opening No. “A” and the west end of opening No. 5, as to passability for cattle? A. It is all right.

Q. And each one of these pencil lines represents approximately where cattle could freely come through? A. Could come through any place.

Q. Now, I want to ask you about the character of the country where you made this opening of half a mile here. A. That is on the Willow Creek.

Q. Is there any creek leading into that at the point of the opening?

A. Well, there is a ravine, and cow trails.

Q. Can you tell me with reference to the passage of cattle coming from the south to the north, whether or not that is a natural place for the cattle to gather, and pass through to the north?

A. It would be; they gather in that locality.

Q. Is it not true there is a little valley running

(Testimony of Drury P. Osborne.)

out through 32, and back around past 31, surrounding that opening at that point? A. It is.

Q. And that valley is a natural gathering place for cattle?

A. The cattle drift into it from the south and the east.

Q. There is a road coming there, isn't there?

A. A road right by.

Q. What road is that?

Q. Tuscarora road passes right by there.

Q. Isn't there another road there also?

A. Another road comes over the Tie Corral country.

Q. How is "Tie" spelled?

A. Railroad ties, that is all the name I know it by. [145]

Q. So that cattle coming down Hot Creek, and straying to the easterly, would catch in that valley?

A. Right in that spot.

Q. And go through that opening?

A. They could, or go around the blue country, either one.

Q. But the creek is inside the opening?

A. The creek runs through the opening, 80 acres, that place belongs to Mr. Russell.

Q. If the cattle coming along on Hot Creek should turn to the left, they could go through this opening here, going in No. 7? A. Yes.

Q. As a matter of fact, the cattle do go through there, do they not? A. They go through there.

Q. What can you say as to the condition of this

(Testimony of Drury P. Osborne.)

fence on the north side, during the fall of 1910 and the spring of 1911, for holding cattle? Did it hold cattle in that neighborhood? A. It would not.

Q. What was the reason for that?

A. Well, the reason for that is, the sheepmen in the spring of 1910, taken it down where they went through with their sheep wagons and things, took it away from Noble's fence, and it was left open from the spring of 1910, say in the middle of May, up to the first of June, somewheres along there, up till the spring of 1911, it was open.

Q. What was the intent of the company in building these fences here, as far as you know it?

Mr. PLATT.—The same objection, if the Court please.

Mr. DENMAN.—That is the very thing you were offering evidence on.

Mr. PLATT.—Same objection, on the ground the foundation has not been laid; it has not been shown that this witness knows the intent of the corporation in constructing the fence. [146]

The COURT.—That objection, I think, is good.

Mr. DENMAN.—(Q.) You said on direct examination you were superintendent of the company?

A. Yes.

Q. And that you had control of the building of fences for the company? A. Yes.

Q. And that under certain instructions from Mr. Kent, within those limitations you had the right to build the fences that were built there?

A. I thought I had; yes.

(Testimony of Drury P. Osborne.)

Mr. PLATT.—I object on the ground the evidence does not show that this witness had any instructions from Mr. Kent.

Mr. DENMAN.—Yes, it is in.

The COURT.—In the direct examination?

Mr. DENMAN.—I don't recollect whether he was instructed to do it generally, or whether Mr. Kent instructed; but he said he had received instructions from the company. I withdraw the question.

Q. You said on your direct examination that you had received instructions from the company to build these fences in here? A. Yes.

Q. Can you tell what purpose these fences served?

A. The fences that is outlined on the map there?

Q. Yes.

A. Well, they served to a certain extent to help carry out the plan of construction and irrigation and water rights, and maintaining the company's rights.

Q. What do you mean by water rights?

A. Well, the company owns the water, and they wanted to put a good deal of the country under irrigation.

Q. Now, you have testified that you had made preparations over two years ago to inclose the remainder of these fields on the south? [147]

Mr. PLATT.—If the Court please, that testimony was stricken out.

Mr. DENMAN.—On the contrary, it was allowed.

Mr. PLATT.—The question was as to making preparations as to doing something in the future.

(Testimony of Drury P. Osborne.)

Mr. DENMAN.—It was finally allowed on the question of intent.

The COURT.—Just read that testimony, where he said he had procured wire.

(The reporter reads the record on page 137.)

The COURT.—Read the last question.

(The reporter reads the question.)

The COURT.—Is that on the south? It was on the north, was it not—the Dutton field, is that on the north or south?

A. It is all called Dutton.

Mr. DENMAN.—I withdraw that question.

Q. In your opinion, does the character of this land in the creeks, owned by the company, warrant their inclosure?

Mr. PLATT.—Same objection, on the ground it calls for the opinion of the witness.

Mr. DENMAN.—Showing the intent of the company.

The COURT.—I will allow that question. It is a question of opinion; but his experience there qualifies him as an expert to testify; you can examine him on that point.

Mr. PLATT.—I just want the benefit of the record, if the Court please, and ask an exception on the grounds stated in the objection.

A. It does.

The COURT.—Warrant what inclosure?

Mr. DENMAN.—Warrant their inclosure.

The COURT.—That is, the inclosure of the lands owned by the company? [148]

(Testimony of Drury P. Osborne.)

WITNESS.—Of the lands that are owned by the company.

Mr. DENMAN.—(Q.) What is the character of the soil in this land lying to the north of the fence in 34, 35 and 36, township 40 north, range 48 east?

A. The creek runs down to it; it is black loamy soil, bottom land, and the upland is good grass land.

Q. Grow hay?

A. Grow hay; all tillable land, might be a rocky point or two that would not amount to much, but the bulk of the land is all tillable.

Q. Is it that very light sandy soil?

A. The bulk of the land is black, sandy loam, light, yes.

Q. What would you say as to the character of that soil? A. It is good.

Q. Now, coming westerly and following the blue line continuously—

The COURT.—Just a moment. Is there any dispute as to the character of that river land?

Mr. PLATT.—No, if the Court please. I didn't ask any questions as to the character of that land; I don't see it makes any difference whether good, bad, or indifferent land.

Mr. DENMAN.—Will you concede that is very superior black loam bottom land, that will grow potatoes and onions?

Mr. PLATT.—No, I will not concede it is very superior; but I will concede that that land is watered by certain creeks; and the witness has testified time and again in cross-examination, although I didn't

(Testimony of Drury P. Osborne.)

ask him in direct examination, that it was black, loamy and good land.

The COURT.—I suppose that may be conceded as to all the land laying on Rock Creek?

Mr. PLATT.—I could not concede that, because I don't know. I cannot make a concession on anything about which I don't know. [149]

Mr. DENMAN.—(Q.) Is that true of all the land indicated by the blue, from Opening No. 1 around to the northerly and easterly to North's fence?

A. Except one point.

Q. How many acres does that point cover?

A. Well, there at the Hot Spring, midway between those points, there is a meadow of probably 20 acres, a meadow caused from the Hot Spring, that would be meadow land; it is a different character of land on account of the meadow is made from the hot springs water overflowing; it is kind of an adobe soil, grass meadow.

The COURT.—That is the only point where the land is not good?

A. That is fine land, but of a different character; just as fine land, it would grow hay or anything, but that is, different character of land.

Mr. DENMAN.—(Q.) How does the country rise out of that on the south side towards this Government land here?

A. Out of the bottom land?

Q. Yes.

A. Just starts abruptly, probably for 25 feet, up in the low hills; the bottom land is laying almost

(Testimony of Drury P. Osborne.)

level as a floor, but when you get outside of the bottom, there is probably a bench of 20 or 25 feet up, then you strike just a rolling country.

Q. So that the two characters of country are distinctly separated by the rise between them?

A. By the rise between them.

The COURT.—(Q.) Is there bottom land all up Rock Creek?

A. Yes, that is a solid bottom, level as the floor.

Q. And wide enough to be tillable all the way up?

A. Well, it is from a quarter to a mile and a half wide.

Q. That is all tillable land? A. Tillable land.

Mr. DENMAN.—(Q.) Now take the Willow Creek side; is the same thing true of this land marked in blue, from Opening No. 8 around up to Opening No. "A"; is that the same character of soil? [150]

A. Well, there is one point below the reservoir, there is a gorge in there of about a mile that is not practical to fence for farming purposes, it would be all right fenced for pasture land, but it is not for farming purposes.

Q. In that whole distance there is only that gorge in about a mile?

A. From the point of this Opening No. 6, above the reservoir, from that point to the point where their fence is down, there is about a mile, outside of the water in the reservoir, only about a mile of that country, that is a big level country to farm, bottom land.

(Testimony of Drury P. Osborne.)

Q. And the connecting land you say is good grazing land, where they fenced? A. Yes.

The COURT.—(Q.) How wide is that bottom land up Willow Creek?

A. That bottom land ranged about from a quarter to three-quarters wide.

Q. That is one-quarter of a mile?

A. Quarter of a mile to three-quarters wide.

Q. And on Rock Creek what was the width?

A. Rock Creek is from a quarter to a mile and a half wide, so far as that is concerned.

Q. One-quarter in the narrowest place?

A. Yes.

(A recess is taken at this time until 1:30 P. M.)

[151]

AFTERNOON SESSION.

DRURY P. OSBORNE, cross-examination continued.

Mr. DENMAN.—(Q.) Mr. Osborne, coming again now to the Toejam Mountain country, I want you to go back to the time before there were any fences along the upper ends of Toejam and Siawappe, and I ask you with reference to Toejam Mountain country, whether cattle grazed and were driven through there during that time?

A. That is, you mean in rodeoing time, or going up or down?

Q. Yes.

A. They passed through that country just the same as before I went there; that is the natural rodeo country, all the Siawappe, and Rock Creek and Toe-

(Testimony of Drury P. Osborne.)

jam country, that is the natural country that they bring cattle to the valley and separate.

Mr. PLATT.—You say before you went there they did that?

A. Since I have been there, before them fences was there, they did the same thing they do to this day. That is the rodeo country in there, rodeo in that country and bring them down right through that country, Squaw Valley Ranch and Lake field, everybody takes his cattle there; there they separate them.

Mr. DENMAN.—(Q.) What, if any, purpose would these fences serve with reference to the movement of cattle in that country?

A. Well, two or three purposes. The first purpose was they was the company's cattle, and what comes from the west—in connection with making fields—was to drift the cattle from the Winters side up into the Noble country; this other side was to keep them from coming, what got into the Rock Creek country, was to keep them from coming and getting on the “25” range.

The COURT.—(Q.) You say one of these fences was to keep cattle from getting on the “25” range?
[152]

A. So the Desmond cattle, and such, would come into the country there, that was to keep them from coming down here, and into the St. John country, i.^e they should want to drift that way.

The COURT.—I understood you to say that these fences were to keep the cattle from going onto the “25” range?

(Testimony of Drury P. Osborne.)

A. Well, in one sense of the word, was to shove these cattle in there, instead of coming into St. John field, would shove them up into that Toejam country, and the high hill, to a certain extent, kind of a dividing line between "25" country and that side.

Mr. DENMAN.—(Q.) Mr. Platt asked you whether or not you had ever built any fence along the south line of these 40's, running from Opening No. 1, around to Nelson's fence.

A. South and east.

Q. South and east side, running there to Nelson's fence; I ask you what you have done with regard to fencing that side?

A. Well, I fenced probably a mile and a half or two miles on the south of them 40's off Toejam.

Q. What else have you done with regard to fencing?

A. I have had the posts and the wire, and everything to construct that fence.

Q. What else have you done?

A. Well, I have had it surveyed.

Q. What else have you had done with regard to the survey?

A. I have had the posts set, that is, the corners on sections, and quarter corners, so we would know how to build the fence.

Q. Who did that for you? A. Neilson.

Q. Is the same thing true of this land of the company along Willow Creek?

A. That has been double surveyed, surveyed twice by Neilson, was surveyed in the fall and the posts

(Testimony of Drury P. Osborne.)

and flags was set; that was the winter we begin to start out, that was in the winter of 1910, and in the spring of 1911 Neilson resurveyed—let me go back. In 1909, the fall of 1909, I think it was, he [153] surveyed that line, then in the spring of 1910, he resurveyed that.

Mr. PLATT.—What line?

Mr. DENMAN.—The north line of the property along Willow Creek.

WITNESS.—I could explain that a little better.

The COURT.—The north line of Willow Creek.

Mr. LEWERS.—Let the witness testify what he did, then we get at it quicker.

Mr. PLATT.—He is talking about generalities here; I want to know what he surveyed.

WITNESS.—What I mean to say, I could tell you the first survey and then the second survey. His first contract was to run section lines.

The COURT.—You had better lead the witness just for that purpose, and find out what he did.

Mr. DENMAN.—(Q.) You had a surveyor in your employ, and had the corner posts set up for the fence along the north line of the properties of the company along Willow Creek?

A. I did.

Q. And then you had it surveyed again?

A. Had is resurveyed, that is, retraced.

Q. Retraced. And you think they had put in a portion of the fence around the dam here?

A. Yes, there was other construction when I left, and I have not asked anybody, I don't know whether

(Testimony of Drury P. Osborne.)

it is finished, I have not asked anybody.

Q. The same thing is true about Siawappe?

A. Yes, same thing about Siawappe.

The COURT.—(Q.) Mr. Osborne, have you cut any hay in that country there inside those fences?

A. I have inside of their line; yes, sir, They harvested a grain crop of something like 470 acres this year inside of that fence, and it is all seeded to elfalfa, that is on company's land below that red line.

[154]

Q. Just point out the place.

A. This country right here (indicating).

Q. What did you have there?

A. There was grain. There was grain and potatoes put in below the dam here, of about, when I left there, probably 15 acres of grain or 10 acres, maybe, I don't know just how much there was.

Mr. LEWERS.—10 acres of what?

A. Grain and potatoes. There also was probably 40 acres of grain and potatoes, mostly grain, put in on Toejam, 30 acres maybe, probably, I don't know.

Q. How many acres would you say?

A. Safely say 30 acres; I never measured it; 22 sacks of potatoes was planted there, I know.

Mr. DENMAN.—(Q.) That is, you were trying out that country?

A. Well, there was no trying out; we knew we could raise them if they were attended to.

The COURT.—(Q.) Is that the first year you attempted to raise crops on that ground?

A. It was in 1911, yes, that is the first time we

(Testimony of Drury P. Osborne.)

had them protected, put these other fences up, that is last year was the first year.

Q. Well, have you ever cut any hay down in the southwest corner of the tract, prior to this year; that is, south of the fence?

A. No, sir, not in that direct locality. Now, that was cleaned off, the brush; the brush cleaned off, I told you, in 1910, and the crop was put in in the spring of 1911; that is a continuous work up Willow Creek, and the other ranch, all west of that for two miles or two miles and a half, is alfalfa, and all the other ranch part.

Q. Where do you use the water that is impounded in the reservoir?

A. We use that on the land I am speaking about, take it over that point, over Rock Creek, and to the Mansion field; it is used on this land here just the same, used on the reservoir, then used [155] out again on that field; then take it in the big ditch around a point, take it into another field out in the Mansion field and down into the Lake field, a radius, all told, of probably 20 miles, a ditch.

Mr. DENMAN.—Take the witness.

Redirect Examination.

Mr. PLATT.—(Q.) When did you begin to survey for fences along the inside border of the land represented in the blue? A. In 1909.

Q. How much of a survey did you order made?

A. Do you mean—was your question of a survey?

Q. Well, you understood my question, didn't you?

Mr. DENMAN.—Which survey?

(Testimony of Drury P. Osborne.)

WITNESS.—Of all fences. In 1909 we had 22½ miles surveyed in one tract; then we had,—well I could not say until I see the company's map, on Fraser Creek, the company, probably 30 or 35 miles we had surveyed that year.

Q. In that 35 mile survey are you not including lands that are without this fence?

A. Well, a part of them.

Q. Well, how much of it?

A. Well, there is—I will have to mark it to you. Start in here at section 1, we surveyed 6 miles east, 6 miles north, 6 miles in here, and 4 miles and a half in Noble's field.

Q. Now all that survey was without this fence, wasn't it? A. Without?

Q. Yes.

A. That survey was made with a calculation of building these fences.

Q. Building what fences?

A. These fences you were speaking about, in connection with them. [156]

Q. Well, tell me what fences it was you were to build.

A. Well, it was made to build Fraser Creek fencing and to get these points, like this section corner.

Q. Wait a minute. You say it was made to build Fraser Creek fence, and to get these points; where is the Fraser ranch?

A. Here. (Indicating on plat.)

Q. The Fraser Ranch is outside of this fence, is it not? A. It is joined.

(Testimony of Drury P. Osborne.)

Q. Is not the Fraser ranch outside of this fence?

A. Of that fence.

Mr. DENMAN.—Joins it.

Mr. PLATT.—(Q.) Well, it is outside of it, is it not?

A. It ain't inside of it; that is a sure shot.

Q. Then you made the survey for the purpose of surveying the Fraser Ranch, did you not?

A. I did not.

Q. What did you make it for?

A. I made the survey in connection with the lands of the company. That is Fraser Creek (indicating); these lands, and these lands up here, lands in what is called the Noble field, summer range, to find out where such and such lands was. That is what this 22 miles was made for, to find these section corners; them is all quarter corners and section corners set; they have surveyed this line, and set corners, whenever we touched a section corner or quarter corner, we set a rock or post, also on the inside; when we crossed here on a section corner or quarter corner, we set a post. That surveying was all done in connection with this fencing.

Q. Let me ask you: will you testify upon oath that it was the intention of the Golconda Cattle Company to build fences upon the inside of the blue lines, and along the outer rim of those blue lines; will you testify upon oath it was their intention so to do, and that they did actually institute and authorize surveys [157] for that purpose?

A. Let me call your attention—

(Testimony of Drury P. Osborne.)

Q. Do you understand my question? A. I do.

Q. Will you answer it?

A. I will answer it this way.

Q. I ask for a categorical answer, and then explain.

A. To run this just as the company's lands run, it was the calculation of the Golconda Cattle Company when they made them surveys to fence all of their lands that was practical, in this here country, and any land they surveyed to make them into fields; to fence both sides of their land; I had orders from the Golconda Cattle Company to that effect.

Q. You got those orders?

A. I have not got them.

Q. Don't let me misunderstand you at all: You got the orders to instruct your surveyors to make surveys, with a view of building fences upon the inside of those lands? A. And outside.

Q. And outside? A. Yes.

Q. Weren't the fences constructed on the outside?

A. Not when that survey was made.

Q. When was the survey made?

A. Part of that survey was made in 1909.

Q. And how much of the fence on the outside was completed in 1909?

A. Very little of it; very little fence made in 1909.

Q. Very little fence there at all?

A. None of this fence was here in 1909.

Q. It was all built since that time, was it?

A. Yes, sir, since them surveys.

The COURT.—Do you mean very little of the

(Testimony of Drury P. Osborne.)

fencing on Willow and Rock Creek?

A. There was none of this fence there, from a point probably about here (indicates).

Mr. DENMAN.—Section 9, township 38 north, range 47 east.

WITNESS.—About that point in here, from that point on around here there was none built in 1909.

[158]

Mr. DENMAN.—(Q.) You mean to the east, and up to the Siawappe country? A. Yes.

The COURT.—(Q.) How about the Rock Creek country?

A. Well, I will answer his question. The Rock Creek country was built to about there, and wire, the posts was set clean through in 1909.

Q. That is about half of it, half of that Rock Creek fence?

A. No; hold on. The posts were all set in the fall of 1909, the wire was stretched from this point about, just about Hot Creek, in there, in the fall of 1909.

Mr. DENMAN.—That creek is in section 1.

A. That is, if that map is right.

Mr. DENMAN.—(Contg.) Township 39 north, range 47 east.

A. Yes, sir. It was built to that point in 1909.

Mr. PLATT.—(Q.) Now, as I understand it, so there won't be any misunderstanding, you got instructions to build fences along the outer rim of this land represented in the blue, or the company's lands as you say, and also received instructions to institute surveys for the building of fences along the inner

(Testimony of Drury P. Osborne.)

side, is that true? A. I had instructions.

Q. Was that the extent of your instructions?

A. Well, my instructions was to put that fence there; all of the Golconda Cattle Company's lands that joined up together, that was practical for grazing or farming, was to fence them in and outside, then my instruction went on to say, anything that was practical to farm, clean the brush out, clean off the brush and put it in alfalfa, or anything.

Q. When did you commence to build the fences on the inside? A. I commenced in 1909.

Q. When did you quit?

A. I quit the first day of July, 1911.

Q. You quit building fences then?

A. Yes, sir. [159]

Q. And how much of the fences on the inside did you build?

A. Well, these fences in here, of course this one in here, you see that is where it gets you, where you can't explain it; all of this other country was an outside country, and that country has been fenced, too.

The COURT.—Read the question.

(The reporter reads the question.)

A. As I say about that map there, why I commenced to build the fences, the fence I first commenced to build in 1909—

The COURT.—That is not responsive to the question. He wants to know how much of that fence on the inside you built, if you can tell; one mile, 2 miles, 6 miles, 7 or 10 miles, or whatever it was.

(Testimony of Drury P. Osborne.)

A. That is in that inclosure there?

The COURT.—That is the way I understand it.

Mr. LEWERS.—If the Court please, we object to the question in that form, or to that interpretation of it, because the question was directed to how much inside fence he built in 1909, and the witness has already testified that this map here only shows a portion of the territory that he was building inside fences on.

The COURT.—He can answer with reference to this map how much inside fence he built at that time. Don't go clear around the ranch to do it; tell how many miles, or as near how many miles, as you can.

A. Well, that is in the year of 1909?

Mr. PLATT.—(Q.) I mean from the time that you got your instructions up to the time that you quit.

The COURT.—That means practically how many he built altogether?

Mr. PLATT.—Yes, your Honor.

A. Somewheres near 11 miles.

Q. About 11 miles of fence?

A. Something like that.

The COURT.—(Q.) Do you understand that to be, Mr. Osborne, the [160] total amount of inside fence which you yourself built, or was built under your direction as superintendent?

A. In touching this locality?

Mr. LEWERS.—Shown by Exhibit No. 1.

A. If I could explain I could show.

Mr. PLATT.—It is not a question of intention.

(Testimony of Drury P. Osborne.)

(Q.) You testify, as I understand it, that you or people under you, while you were employed by the Golconda Cattle Company, built 11 miles of fence, is that true, on the inside of that inclosure?

Mr. LEWERS.—No.

WITNESS.—That is in making fields; that is what your question is, ain't it?

Mr. PLATT.—(Q.) You know what I mean by the inclosure, don't you? That inside this rim here. Now, do you understand what I mean by inclosure?

A. Yes. Just wait—

Mr. LEWERS.—I ask that the witness be given an opportunity to answer.

Mr. PLATT.—I am trying to get him to answer.

The COURT.—The witness is very willing to tell what he knows, there is no fault to find with him in that respect; but he tells too much. When the question is asked, how many miles you walked, you should say one mile, two or three miles, and not tell all about why you walked, and so on. Just simply answer the question as it is given, but don't try to give anything more.

A. I should say from looking at that map there, what I built and reconstructed and then took down and rebuilt again, about 11 miles.

Mr. LEWERS.—Now pardon the interruption. (Q.) You mean on the territory shown by Government's Exhibit No. 1? A. Yes.

Mr. PLATT.—Now, if the Court please, I assume any lands without this inclosure are not among the issues of this case?

(Testimony of Drury P. Osborne.)

The COURT.—It will be assumed that these questions all relate [161] to this territory, unless it is very clearly indicated to the contrary, because unless counsel show me very plainly that I must admit testimony with reference to other tracts of land, I don't want it put in. I am not deciding that point, I simply indicate my wish about the matter; confine it just to this particular matter.

Mr. DENMAN.—Where a fence is shown here on the map, I presume it is within the issue to show that is simply a part of a field which is off the map, as showing the reason for its being there?

The COURT.—That is all right.

Mr. PLATT.—(Q.) Now, Mr. Osborne, did you help build this fence in the red, from Opening No. 1 to Opening No. 8? A. I ordered it built.

Q. How long is it?

A. Well, I judge from the way you have got it marked there, it would be about three miles and a half.

Q. About three miles and a half. Now, indicate upon the plat where the other seven miles and a half of the fence were built on the inside in that inclosure.

A. Well, according to your map, this would all be fence built in 1909.

Q. I say built on the inside of the blue lines, and not the outside.

Mr. LEWERS.—If the Court please, I object to the question, because that illustrates just the difficulty we sought to avoid this morning. Taking this exhibit the way they have chopped it off, right

(Testimony of Drury P. Osborne.)

straight through the center of the ranch, something which is in fact, and which the witness applying the ordinary [162] meaning of words, would say was on the inside, according to their artificial showing is on the outside, and that inevitably produces confusion.

The COURT.—That may be true, but I prefer for my own part to find out just what the condition is here, and then if it becomes material to know something about other portions of the ranch, I would like then to have them segregated; I don't want the two mixed together in my own mind.

WITNESS.—Well, I will explain to the Court.

The COURT.—And Mr. Platt's question is directed to the conditions on the tract of land which he has attempted to show on that map. Whether he has shown it correctly or not, is to be determined, but his question is directed to that, and that is what I would like to know also.

WITNESS.—All right, I will explain.

Mr. LEWERS.—But the suggestion is that the term "inside" is used, which, applied to this map, is misleading to the witness.

Mr. DENMAN.—I have a suggestion in that regard. Let us speak of these lands as between the creeks.

Mr. PLATT.—I submit I think counsel are a little fearful whenever I use the term "inclosure" I am talking to a jury here instead of a Court, and that some statement I might make in that regard in the way of a question, would be binding upon the Court.

(Testimony of Drury P. Osborne.)

WITNESS.—Well, I will explain that this fence here—

The COURT.—Now, just wait a moment. Read the question.

Mr. PLATT.—I will ask another, and withdraw the last one.

Q. Outside of the fence indicated by the red on this plat, beginning [163] from Opening No. 1 and ending at Opening No. 8, outside of that fence, and in addition to that fence, how much other fence did you order built upon the rim of land shown upon the blue on this plat, such rim of land pointing or extending up against the Government land upon that plat? Now, do you understand that question?

A. Well, I ordered all of this fence built from this point here around to this point (indicates).

Q. I didn't ask you how much you ordered built.

Mr. LEWERS.—You did ask that.

WITNESS.—You just did ask me.

The COURT.—Wait a moment. Read the question.

(The reporter reads the question.)

Mr. PLATT.—He can answer that, and I will ask him another question. What I want to know is the fence actually built.

The COURT.—Do you understand the question?

A. Yes. He asked how much I ordered built from this point here—

Mr. PLATT.—From an opening indicated as “Opening No. 6.”

A. I ordered the fence built from this point here,

(Testimony of Drury P. Osborne.)

commence at this point, I ordered it built from that point around the dam to this point (indicates). Now I also ordered—

Mr. DENMAN.—Wait a second. That means then—

A. From where the lane goes down and crosses Willow Creek—

Mr. DENMAN.—One moment. That is the place marked “28” inside of the word “Creek.”

A. Yes.

Q. From there easterly to where?

A. To this opening here.

Q. That is Opening No. 6? A. Yes.

Mr. PLATT.—(Q.) When did you order that fence built?

A. Well, I ordered that fence built probably in—in fact, I had a man setting them posts on the north side of this, some time in April.

Q. Of what year? A. 1911.

Q. April, 1911. Now there is no mistake about that date, is [164] there?

A. Well, as I say, I had a man at the dam, and he was packing the posts, of course I hauled posts and everything up, to build that fence in the fall of 1910.

Q. But you ordered it built some time in 1911, in April?

A. Yes. I ordered the men to go and start in to built it.

Q. Outside of this fence indicated in the red, between Opening No. 1 and Opening No. 8 how much

(Testimony of Drury P. Osborne.)

fence did you actually construct and built along the inside of what is represented as the blue upon the plat?

A. Well, when I left they had the fence to about the point of the dam, my men, I wasn't up there; they was stretching the wire. As I say, I know nothing about from this on. I saw this fence finished and coupled up there; that was done in 1911.

Q. Do I understand you to testify that there was a fence actually built when you left from a point about where my pencil is?

A. Oh, no, not down there where this lane goes down in the Willow Creek; that crosses the creek, comes up over this ridge, and back to the dam; that was a fence.

Q. That was a fence built?

A. Stretching the wire when I left.

Q. And that fence was in addition to the fence, was it not, in the red, from a point marked "Gap," down to Opening No. 6, a quarter of a mile? A. Yes.

Q. Encircling the reservoir?

A. The reservoir and this flat above the reservoir, and also below the reservoir.

Q. Now is that all the fence that was built when you left there?

Mr. DENMAN.—On the south side or north?

Mr. PLATT.—On the whole plat.

A. And this fence up here (indicates).

Q. Is that all?

A. Then there would be this fence that is on the east side.

Q. This fence you indicate between Opening No. 1

(Testimony of Drury P. Osborne.)

and the letter [165] "T" is on the outside of the blue, is it not, and not the inside?

A. That may be a trick, I don't know.

Q. Well, I am not talking about tricks. It is indicated upon this plat, is it not, as being on the outside of the blue, and not on the inside?

A. It is the company land; I know that.

Q. Well, is it not indicated on the plat as being on the outside of the blue, and not on the inside?

A. I suppose it is.

Q. Well, is it; I don't want your suppositions, is it?

Mr. LEWERS.—The question has been answered.

Mr. DENMAN.—Of course we will cross-examine on that.

Mr. PLATT.—I think that is manifest from looking at the plat.

Mr. DENMAN.—You have not put in there the company's land in blue on the outside of that; it is not a fair plat.

WITNESS.—I leave it to the Court if it is platted right.

Mr. DENMAN.—The point I make is this, your Honor, that in drawing this plat, that should be in blue in there, to be consistent with the rest.

Mr. PLATT.—I submit if this were in blue it would make no particular difference, in so far as the question I have asked may be concerned, because the point is, if the Court please, even if this is all in blue, the inside of this plat next to the Government land is not inclosed; that is the point I make, I don't care

(Testimony of Drury P. Osborne.)

how much of this land is in blue.

WITNESS.—Well, I can answer—

Mr. DENMAN.—Wait your time; I will ask it later on.

Mr. PLATT.—(Q.) While you were foreman of that ranch, did cattle belonging to any other company or persons, graze and pasture upon the lands indicated upon the plat in the blue? A. Yes, sir.

Q. Who gave them permission so to do?

A. Didn't have to have any. [166]

Q. Well, did anybody give them permission?

A. Nobody.

Q. Was there any understanding between these cattle men and your company that they had the right to do it? A. I suppose there was.

Q. Well, do you know of any such understanding?

A. Well, I don't hardly know how to answer that. Stockmen don't have altogether to ask one another if they go on lands that is not inclosed.

Q. Do you mean to say that the Golconda Cattle Company while you were foreman permitted any cattlemen, regardless of the number of cattle they might have, to go upon any of the lands held in private ownership within this so-called inclosure, and graze and feed their cattle?

A. If they wanted to, yes, sir.

Q. If they wanted to do it they could do it?

A. Yes.

Q. Whether it was private lands or whether it was Government lands, do you testify to that?

A. Yes.

(Testimony of Drury P. Osborne.)

Q. And there is an open, outstanding privilege to everybody— A. There is no invitation.

Q. (Contg.) To come in and graze cattle on the private lands of the Golconda Cattle Company?

A. They have a perfect right to graze their cattle on the Golconda Cattle Company's land as long as it is not inclosed.

Q. Was that proviso and condition made by your company to these cattlemen? A. No, sir.

Q. Why do you so testify?

A. Because that is the custom of the country.

Q. Any land then that is not inclosed, anybody can come in and herd or graze cattle upon it; is that true?

Mr. DENMAN.—We object, it is calling for the conclusion of the witness. [167]

Mr. PLATT.—You have been asking opinion questions here for an hour.

The COURT.—Make your objection, and the Court will rule on it.

Mr. DENMAN.—I was going to intimate we had reached the limit on that line.

Mr. PLATT.—I objected to opinion testimony and—

Mr. LEWERS.—There is an objection, I think.

The COURT.—I will overrule the objection.

WITNESS.—They can.

Mr. PLATT.—(Q.) Suppose the land is inclosed, what is the understanding?

Mr. DENMAN.—There is no testimony of any understanding at all.

Mr. PLATT.—Or what is the custom?

(Testimony of Drury P. Osborne.)

Mr. DENMAN.—Object to that on the ground it calls for the opinion of the witness; there is not shown to be any custom.

The COURT.—I don't think that is necessary. I will sustain the objection to that.

Mr. PLATT.—(Q.) Has it been the custom of the Golconda Cattle Company to permit ranchers or cattlemen to graze their cattle upon lands which were inclosed by the Golconda Cattle Company?

A. These as was inclosed in their fields, no, not without permission.

Q. Not without permission.

A. That is, of their fields.

Q. From whom did they get permission?

A. They would have to get permission from the foreman or the superintendent.

Q. Did any cattlemen ever come to you while you were foreman and ask your permission?

A. To put cattle in that locality?

Q. Yes. A. Never did.

Q. Did any cattleman ever come to you while you were foreman and ask permission to graze his cattle upon any of the inclosed lands shown upon this plat?

A. He did not. [168]

Q. Did any cattleman ever come to you and ask permission to graze his cattle in and about the lands owned by the Golconda Cattle Company near what is known as the reservoir?

A. I never have seen the time but what they could go in there and graze.

Q. Without permission?

(Testimony of Drury P. Osborne.)

A. Without permission.

Q. How about these lands you put in alfalfa, which you testified were within the inclosure?

Mr. DENMAN.—Which inclosure do you mean?

Mr. PLATT.—Within the large inclosure.

Mr. DENMAN.—He testified they were in fenced fields.

Mr. PLATT.—(Q.) How about these lands you testified were fenced off and in alfalfa, did anybody ever come to you as foreman, and ask that privilege to graze their cattle in those lands? A. No, sir.

Q. Was it a privilege given to cattlemen to do that?

A. If they wanted to hold a bunch of cattle in any of these fields, if they wanted to hold a bunch, moving stock, if they would ask you—they didn't have to ask you—it was customary to come to that field, if it was night up there, and nothing there, no growing crop, they had a right to turn in and hold over night, the same as any other cattlemen in the country.

Q. Suppose they wanted to stay a week instead of one night?

A. That is not a supposed case, because a man would not want to do that.

Q. Was it within your experience that any cattlemen grazed cattle within this inclosure represented by the fence, for a longer period than one night?

Mr. DENMAN.—What inclosure do you refer to?

Mr. PLATT.—By the big fence on the plat.

A. So far as that is concerned, the cattle shift through there, [169] back and forth; I don't see

(Testimony of Drury P. Osborne.)

where that question pertains to that.

Q. Did any cattleman ever ask you as foreman for the privilege and right to graze his cattle upon any of the lands represented in the blue upon this plat?

A. He never did.

Q. Now, you are positive about that, are you? You are absolutely positive?

A. I want to know, on the lands that are not in the company's fields?

Q. That is not the question I asked you. I asked you whether any cattleman had ever asked you the privilege to graze his cattle upon any of the lands represented upon this plat as being in the blue.

Mr. DENMAN.—Object to that as too vague and indefinite. Ask him whether in the inclosed fields or outside of the inclosed fields.

Mr. PLATT.—I cannot make it any more definite than when I say on the lands shown inside the blue.

The COURT.—I will overrule the objection.

A. Never did.

Mr. DENMAN.—You understand that last question referred both to the inclosed fields, and those not inclosed? A. That is all right.

Mr. PLATT.—(Q.) Now, you thoroughly understand it, and you don't want to change your answer, do you?

A. I ain't going to change it; I am speaking about all that territory.

Q. Do you know of any cattleman or men during the time that you were foreman, who drove their cattle across the country shown in the white, within

(Testimony of Drury P. Osborne.)

this so-called inclosure, and who started to drive their cattle over that land from the west?

A. When the fence was in the supposed inclosure, or before any time?

Q. I will ask you before. A. Yes. [170]

Q. How long before? A. About 3 years.

Q. Can you name the cattlemen who grazed their cattle over these Government lands indicated, and who started them across those lands from the west about 3 years ago? A. Yes.

The COURT.—Was that 3 years ago, or 3 years before the inclosure?

Mr. PLATT.—Three years before the inclosure.

A. That is 3 years ago, that is the way I will answer the question. John Saval took his cattle through there.

Q. Anybody else?

A. Fairchild brought cattle through there from the other way, to Midas.

Q. I am not talking about the other way. You know what I asked you. Who else?

A. Several little bunches of cattle back and forth, I never paid no attention to whose they was.

Q. You said you knew.

A. I said I knew Saval took his through.

Q. Who else?

A. I have seen cattle going through there, down to the road, but I didn't go every time to see whose they were.

Q. As a matter of fact, haven't you many times before that inclosure was up, seen cattle go across

(Testimony of Drury P. Osborne.)

that Government land from the west? A. No.

Q. No? A. No, sir.

Q. Didn't you just testify you did?

A. I see them cattle go across there of Saval's. You speak from this point here (indicates on plat); the cattle drift into this country, driving cattle through here, goes up the road, goes up to Snow Canyon, and up that country.

Q. Do you know what west is on that map?

A. Yes.

Q. Didn't you testify many times, 3 years before the inclosure [171] was put up; or, as you modified it, 3 years ago, that you saw cattle being driven across this Government land from the west?

A. I have only saw Saval drive his cattle when he was moving.

Q. Have you ever seen anybody else's cattle go over that inclosure from that direction, before the inclosure was up?

A. I suppose I have seen some few cattle go over there; they might not have went across the inclosure, I didn't follow them; I saw cattle on Willow Creek; and I say I didn't see them cross it.

Q. Did you ever see them upon any of this Government land, coming from the west, before that inclosure was up?

A. Well, coming from the west, what do you mean? Coming across the white there from the west?

Q. Yes, coming across the country from the west, I mean the left hand side of this plat, going toward

(Testimony of Drury P. Osborne.)

the right hand side of the plat.

A. No, I never did.

Mr. DENMAN.—You mean by that, coming up from the creek?

Mr. PLATT.—I mean coming anywhere from the west here.

A. No.

Q. Did you ever see Saval's?

A. I see Saval drive his cattle, moving his cattle through that country.

Q. Did you ever see anybody else driving his cattle through that country?

A. Seen several little bunches of cattle going through that country; don't know whose they was. Fairchild drove his cattle back through there, his dairy cows, from Midas back home.

Q. Came from the west to an easterly direction through there?

A. Through the road, through the trail.

Q. You say you saw several bunches of cattle going across this Government land from the west?

A. I didn't say that at all.

Q. What did you say?

A. I said I didn't, only them that was drove.

[172]

The COURT.—He said he saw one bunch of cattle driven through there, and saw some other bunches, but didn't know to whom they belonged; but he saw Fairchild's driven across.

A. That is on the trail.

Mr. DENMAN.—He referred, your Honor, to

(Testimony of Drury P. Osborne.)

driving through this trail here.

The COURT.—The question was anywhere from the west, which includes any particular point that any of you want to put there on the west.

Mr. DENMAN.—He checked it up afterwards to there.

The COURT.—You understood that question, did you; that it was any band of cattle that was driven from the west across Rock Creek, through this territory in question?

A. Well, of course I would have to answer yes.

Q. Have you seen cattle that were not driven, go across there? A. I have not.

Mr. PLATT.—(Q.) And that, as I understand, you saw before this line of fence along the western side of this plat, or the left hand side of this plat, was put up?

A. Yes.

Q. Did you ever see any sheep driven across there from the west? A. Yes.

Q. Who drove the sheep?

A. Well, quite a number.

Q. Well, name some of them.

A. Tom Nelson, Burr Stewart and Carter; Wheeler Live Stock Company, Palo Alto Company, Noble and Smith.

Q. Anybody else?

A. Probably Golconda Cattle Company.

Q. When did you see them driven across there?

A. I saw them driven across there, some of them same people has driven sheep through there every

(Testimony of Drury P. Osborne.)

year since I have been with the Golconda Cattle Company. [173]

Q. Did you see them drive the sheep across before this line of fence was up along the west?

A. Yes, sir.

Q. Do you recall anybody else?

A. Oh, there is lots of sheep men, sometimes 180 or 190 bands crosses there in a year, up in that country.

The COURT.—How many bands?

A. Probably 180 bands, that would be probably three hundred thousand sheep crosses that country in a year; that is through this country, through the trails, some up here and some through here (indicates on plat).

Mr. PLATT.—(Q.) When did all these sheep cross this country indicated in the white within this boundary line?

A. Some of them, some people crosses them sheep every year. Tom Nelson puts his sheep in there every year, commences in at that lane, and lambs in that territory every year, has ever since I have been there, and he tells me and other people tell me, he has had it for something like 18 or 20 years.

Q. He has had it?

A. That is, he has used it.

Q. Do you know who gave him the privilege of using it?

Mr. DENMAN.—We have been all through that before.

WITNESS.—Yes, I have thrashed that out.

(Testimony of Drury P. Osborne.)

Mr. PLATT.—Well, I have asked you the question, do you know? A. I do not.

Q. Were there more sheep crossed that land from the west before that line of fence was up, than after it was put up? A. No more.

Q. You know that positively? A. Yes.

Q. How do you know that?

A. Anybody that wants to cross that country when it was open has the same privilege to cross that country to this day, without any interference whatever.

Q. And for that reason you say the same number crossed it after the fence was up as before? [174]

A. Could if a man wanted to take them through. Spanish Ranch don't bring their sheep that way; Stewart and Carter don't take their sheep that way, they take them up Ruby Valley.

Q. That is the reason you give why as many sheep cross now as before the fence was up?

A. Could cross now if there was as many.

Q. How is that, again?

Mr. DENMAN.—What is the reason?

Mr. PLATT.—(Q.) They could do it if they wanted to, that is the reason you give?

A. They could do it if they wanted to, yes.

Q. Now, you testified there were a few places in the Toejam Mountain region that a person could cross that with a wagon; now what were those places?

A. I can take you across most any place there with a wagon.

(Testimony of Drury P. Osborne.)

Q. When you said a few places, you didn't mean it, did you?

A. A few places in that smaller territory, yes, you can go through that country with a wagon, through there with a wagon anywhere, you can go through it with a wagon, I can.

Q. When you testified in cross-examination that you could cross there in a few places, you meant you could cross there any place in a wagon, didn't you?

A. Yes, any man that knows anything about a mountain country knows, you might run up against a rock, probably have to turn out a little, go over or around a little, or something, but I can take you through there, if it was put down to your question, and a man marked his wagon tracks, I could put you through there in a hundred places.

Q. If you knew a few possible ways by which you could go through there, you could take me through?

A. I know I can go through it; I have been through it.

Q. And almost any place there? [175]

A. I could take a buggy team and go through any place, if I wanted to get over that hill.

Q. Now there is no mistake about that, is there?

A. There is not.

Q. Do you know, Mr. Osborne, what the purpose of building that entire fence as shown upon the map, was; what was the purpose?

A. Well, there was two or three purposes.

Q. What were they?

A. One was to steer cattle up to the mountain, and

(Testimony of Drury P. Osborne.)

the other purpose was the company's intention of fencing their own lands.

Q. Any other purpose?

A. As I say, that would be enough, would it not?

The COURT.—(Q.) Well, can you think of any other reason, except those you have given?

A. No, it was dividing lines, to a certain extent, to put the cattle up; no use in going in any details about explaining why certain propositions was put there, unless something else could be explained in connection with it. That is the proposition about that.

The COURT.—I think that is a sufficient answer for the present unless they ask another question.

Mr. PLATT.—(Q.) Was one of the purposes of this fencing to keep the cattle of the Golconda Cattle Company that might get into this inclosure here of the Government land, from getting out? A. No.

Q. That wasn't the purpose at all?

A. They would get out.

Q. But the fence wasn't built to keep anything in, was it? A. No, sir, it was not.

Q. That wasn't the purpose of the fence?

A. No.

Q. Was it built to keep anything out?

A. No, sir, it wasn't built to keep anything out; that is, to keep it out, because that— [176]

Q. (Intg.) Then, as I understand you to say, the fence was not built to keep anything in, and it was not built to keep anything out; is that right?

A. As I said before, the fence was built with the object of helping steer stuff up, and at the same time

(Testimony of Drury P. Osborne.)

with the object of building the fence, was for the company to fence their lands.

Q. To steer stuff up where?

A. Into the high mountains. I tell you, if you were a cow man, a cow man could explain it.

The COURT.—Haven't we been over that already?

WITNESS.—We have been over it time and again.

Mr. PLATT.—It was asked in cross-examination, and I was endeavoring to straighten the witness out for my own information, and for the benefit of the Court, in redirect examination. I did not ask the purpose of the fence, or any opinion of the witness concerning the fence, in my examination, that was drawn out by counsel.

Mr. DENMAN.—It was cross-examining on intent, though.

Mr. PLATT.—That is all.

Recross-examination.

Mr. DENMAN.—(Q.) I just want to ask one or two further questions. This fence here from opening No. 1 to T. 39, R. 47 east, is an inside fence towards this Creek country, of a field on the outside, that ought to be marked in blue if it were similarly marked to these lands here; that is correct, is it not?

A. Yes.

Q. And all these lands here, I am referring now to the lands westward from North's fence for about a mile and a half or two miles. A. Two miles.

Q. In order to make the map a true map, there should be blue lines [177] or blue tinting around the inclosure, or in the inclosure, beginning at T. 39,

(Testimony of Drury P. Osborne.)

R. 47 east running west to 19, on the line drawn on the map, down to the line opening No. 1, and back up to the point of commencement; that is correct, is it not? A. Approximately, yes.

Q. That should be in blue?

A. Yes, these lands that are marked blue on here inside, I don't see why these should not be marked blue to correspond.

Q. And the same thing is true, is it not—

Mr. PLATT.—I suppose we are to be governed by that opinion, if the Court please?

The COURT.—Do you expect to prove title to those lands in that way? There is an admission that the blue land there is land in private ownership, and that the white land is in Government ownership.

Mr. DENMAN.—Inside the creek.

The COURT.—The admission don't go any further. It seems to me it would be just as well, without examining witnesses, to concede that, if it is the fact.

Mr. PLATT.—Why, if the Court please, as I stated to your Honor, it does not make a bit of difference to me how much land they prove to have owned outside of that fence, because I don't consider it an issue in the case.

The COURT.—I understood the purpose of your question, where you show a line on the inside of the blue, and some of the blue land fence out, you naturally expect the Court to draw an inference as to the purpose of that fence?

Mr. PLATT.—That is true, if the Court please.

(Testimony of Drury P. Osborne.)

The COURT.—Now, you have there a situation where the line is drawn on the outside of the blue, is it not; the blue is all on the inside of the line? [178]

Mr. PRATT.—That is true.

The COURT.—Now, I don't understand exactly why you want to show that there is still blue land on the outside of the line, and not inside the inclosure, what is the purpose?

Mr. DENMAN.—The purpose of that is to show this: These little knobs here (indicating), which are cross-cut pieces, a straight line just cutting off these notches at the end, are surplus pieces put aside, and that this is a part of a big field here; so when he was asking about inside fences, how many miles of inside fences we built, that was a part of an inside fence. Here is the outside fence, here is the blue out here, and here he had the fence outside. Now, the question is what inside fences have they built?

The COURT.—You call it an inside fence and he calls it an outside fence, and you want the Court to understand distinctly what it is?

Mr. DENMAN.—Yes.

The COURT.—I don't know that it is necessary to prove title to that land for that purpose. Unless that is disputed, I shall accept it as true.

Mr. PLATT.—As I have so many times stated, it is immaterial to me whether they have title to this land or not. It is admitted here that they have built and maintained these fences.

Mr. LEWERS.—Will you admit we do have title to that land out there, for the purposes of this case?

(Testimony of Drury P. Osborne.)

Mr. PLATT.—I don't know whether they have, but for the purposes of the case, I would willingly admit it. I cannot see its materiality, its bearing upon the issues at all.

Mr. LEWERS.—We assure you, Mr. Platt, we do have title to that; and for the sake of facilitating the hearing, just as we stipulated to save time, on the inner land, we ask whether you will not equally well stipulate as to that. [179]

Mr. PLATT.—Well, we could not stipulate that all of the blue land belongs to the Golconda Cattle Company, because there is some of it that does not; that is, where it connects with these other fences; but I think substantially all of the land indicated in the blue, within the fence, belongs to the Golconda Cattle Company, together with some of these lands on the outside.

Mr. LEWERS.—That is not the question.

Mr. DENMAN.—The testimony is that the fences go to the extent of the land, and that outside of that it is other land. Now, all the land to the south of Opening No. A in blue, with the exception of 80 acres—

WITNESS.—Excepting Mr. Russell's 80 acres.

Mr. DENMAN.—(Contg.) At opening No. 6, and around to the beginning of the map, the blue at the southwest corner, the testimony is that that belongs to the company. And the testimony is that the land west from North's fence in the blue, around to the southwest corner is the company's land. That is what you want, as I understand it?

(Testimony of Drury P. Osborne.)

Mr. PLATT.—I think so. That includes all of the land within the blue, as I understand it, with the exception of 80 acres, which you say belongs to Russell?

Mr. DENMAN.—And the blue at the northeast corner, above Opening A.

The COURT.—Does that mean all the blue below Opening A, is company land, excepting 80 acres?

Mr. DENMAN.—That is the testimony.

Mr. PLATT.—Who do you contend owns that?

Mr. DENMAN.—I don't know. I don't make any contention about it.

Mr. PLATT.—You made no contention or admission in regard to that? [180]

Mr. LEWERS.—I will admit that Thomas Nelson owns it, as far as I know.

WITNESS.—Southwest quarter of section 5, 80 acres.

Mr. PLATT.—As I understand it, Mr. Nelson owns 80 acres of that land up in the northeast corner?

WITNESS.—The company owns 80 acres here, and the supposition is that Nelson owns the rest of that patented land.

Mr. PLATT.—May it be admitted, if the Court please, without proof, in order that we may save time, that all of this land in the blue, near the representation upon the map, "Toejam Mountain" is owned by Mr. Nelson, save and except 80 acres, which is owned by the Golconda Cattle Company.

Mr. DENMAN.—I don't think we want to admit Nelson owns it. We admit it is not owned by us.

WITNESS.—I don't know that Nelson owns it.

(Testimony of Drury P. Osborne.)

Mr. DENMAN.—We admit it is in private ownership, but is not owned by us, with the exception of 80 acres.

Mr. LEWERS.—We suppose it is Nelson's.

Mr. PLATT.—(Q.) Do you know, as a matter of testimony, whether Nelson ever leased any of those lands from the company?

A. According to the blue, you have stated all the time here in the blue is patented land. Now, of course, we know the point we own to, but we are not supposed to know who owns the other patented land, these 40's in here (indicates), I ain't swearing I know who owns them at all, and I say the same up there.

Mr. LEWERS.—(Q.) Have you ever heard who owns them?

A. I have heard that Tom Nelson owned them.

Mr. PLATT.—(Q.) That is the rumor, is it?

A. That is the rumor, I have heard that.

Q. Have you any leasing privilege at all from Nelson to use those lands up there? [181]

A. None whatever, no leasing proposition.

Q. Have you any understanding with Nelson that you can use those lands? A. What lands?

Q. Up near Toejam Mountain, indicated in the blue? A. No, sir.

Mr. PLATT.—That is all.

By Mr. DENMAN.—(Q.) Suppose cattle were confined in this territory here, and the company had fenced its lands, and the blue were completely fenced on this map, what would happen to cattle grazing on that Government territory?

(Testimony of Drury P. Osborne.)

A. Starve to death for water.

Mr. PLATT.—I object on the ground the question is too general. They might freeze to death, or might not, which of course would not affect any of the issues in this case. And I object on the further ground the question calls for an assumption on the part of the witness, as to what might happen, physically or otherwise, to cattle, calling for an expression of opinion and an assumption.

The COURT.—I don't think it is very material; the Court will not be misled by it very much.

Mr. DENMAN.—The only point is, all the water is in the blue.

The COURT.—The Court would understand ordinarily if you put cattle in a close field where they cannot get out, something serious is going to happen to the cattle.

Mr. LEWERS.—That is, where there is no feed.

The COURT.—I am not adding any conditions. I have lived in Nevada long enough to know if you put cattle in a field and fence them in, and there is no opportunity for them to get out, it is rather a serious thing for the cattle. I don't think it will be necessary to prove it any further. [182]

Mr. DENMAN.—The point I am making is, if that were done, there would be no water for the cattle.

Mr. PLATT.—Do I understand the contention is if the land on the blue were fenced on the inside of the blue, because those fences were up, there would not be any water on the inside.

Mr. DENMAN.—Probably.

(Testimony of Drury P. Osborne.)

Mr. PLATT.—I am glad to know the view point. I don't see how a bare wire fence is going to prevent irrigation of lands. That is all.

Mr. DENMAN.—(Q.) Can you get water from any of these creeks, upon this Government land up in here? A. None whatever.

Q. Why?

A. Well, I will take that answer back. There is a canal surveyed out of Toejam, in across here (indicating), to come down into the reservoir through a long draw that comes down through here, by a cut of about 30 feet out of Toejam, through the rim of that hill, 30 feet; you can bring water in a long draw.

Mr. PLATT.—Just mark where the draw is.

A. That is what I have heard, I never have seen the survey.

Mr. DENMAN.—(Q.) That is all you know about it? A. I have heard it.

Mr. DENMAN.—I move to strike it out on the ground it is hearsay.

Mr. PLATT.—I contest the motion to strike out on the ground the witness testified positively as to the building of a canal, and testified positively that there was a draw here.

WITNESS.—Well, as I say, I testified that I have heard there was one time there was a proposition of bringing water over into the Willow Creek side, I don't know whether it was practical, I never surveyed it, or know nothing about it.

Mr. DENMAN.—I move to strike out the testimony on the ground it is hearsay.

(Testimony of Drury P. Osborne.)

Mr. PLATT.—I resist the motion. [183]

The COURT.—I will grant the motion, on the ground it is immaterial.

Mr. PLATT.—Your Honor will give us the benefit of an exception.

The COURT.—Certainly.

Mr. PLATT.—And I desire to cross-examine the witness on the question as to whether water could in fact be conducted on any of these lands, for the reason we consider it is material.

The COURT.—Why, Mr. Platt?

Mr. PLATT.—As a part, if the Court please, of this scheme of the Golconda Cattle Company by attempting to build fences upon its own lands to inclose Government land, for the purpose of ultimately using and watering those lands, for the purpose of grazing their own stock therein, and without acquiring ownership from the Government of the United States to the land; in other words, using this fence as a guise, for the purpose of using for nothing lands belonging to the Government.

The COURT.—You want to show the possibility of another use; that water can in some way be got on those lands for irrigating purposes. The testimony all is that for some months in the year there is grass on those lands; and while there was some testimony to the effect that cattle could not get any water there, I did not understand from the testimony that has been given, that all those creeks were so fenced that cattle inside the fences could not get any water.

Mr. PLATT.—Then there is another purpose, if

(Testimony of Drury P. Osborne.)

the Court please, and that is this: If it may be shown from the testimony that these lands could be irrigated either by the Golconda Cattle Company, or anybody else, they certainly would be much more valuable than if they could not be irrigated.

The COURT.—I will allow you to put it in, but I still think it is not very material. My present impression is that it is not [184] material, but if you think so, it is like a good deal of the other testimony that goes in, I don't see the relevancy of it, but I assume counsel will point it out before you are through with the case.

Mr. PLATT.—(Q.) How big is that dam?

Mr. DENMAN.—What dam? Which one?

Mr. PLATT.—There is only one I know of, that the witness referred to in cross-examination. I am examining him redirectly now upon his cross-examination. You asked him about a dam and he was testifying.

WITNESS.—What dam do you mean?

The COURT.—Is that the reservoir?

WITNESS.—There is several dams.

Mr. PLATT.—(Q.) Didn't you know what dam you were testifying about when counsel asked you?

Mr. DENMAN.—I didn't ask about a dam.

Mr. PLATT.—I submit that he did, and the record shows it.

A. That dam, yes, I know about that dam; that is, I don't know how big it is.

Q. Oh, you don't? A. No.

Q. Did you ever see it? A. I almost made it.

(Testimony of Drury P. Osborne.)

Q. You don't know how big it is?

A. No. What I mean is I don't know the exact number of cubic yards in it, and I don't know how many acre-feet it will hold, or anything of that kind. All I know is that I had the big end of that work done on it.

Q. Can you give me an approximate estimate, within a mile, as to its dimensions?

A. Mile of water, or what?

Q. How big do you think it is?

The COURT.—About how many acres.

A. How many acres? Well, it would probably cover, to its full capacity, probably 300 acres. [185]

Mr. PLATT.—(Q.) Is it ever filled to its full capacity?

A. Yes, sir, and runs over for months.

Q. And runs over? A. And runs over.

Q. Runs over freely? A. Yes, sir.

Q. Well, it could be enlarged then, could it not, to hold more water?

A. It could hold the whole Tuscarora mountain.

Q. No question about that, is there?

A. No question but what it will hold a lot of water.

Q. If it were enlarged to hold a great deal of water, and could hold all this Tuscarora Mountain water as you testified, could any of these Government lands be irrigated from it? A. Not practical; no.

Q. Why not?

A. Because they are too rough, too rolling.

Q. It would be impossible to get any of that water upon any of these Government lands?

(Testimony of Drury P. Osborne.)

A. I suppose if it was built up high enough, you could on some of them.

Q. If the dam were constructed properly, with that end in view, and built high enough, these lands could be irrigated, could they?

A. Very little of them, if any.

Q. Well, how much?

A. I don't know, I am no surveyor.

Q. Could any of them be, in your opinion?

A. Could not say any of them, no.

Q. Would you say they could not?

A. No, I would not say they could not.

Q. Don't you know, as a matter of fact, many of these lands are not precipitous, are not mountainous, but, as a general thing, this is a rolling plain?

A. A rolling plain?

Q. Yes. A. Well, it is rolling land.

Q. There are no high mountains in it, are there?

A. No high mountains, but some long high ridges in it, yes. [186]

Q. Don't you know this land begins to get high, and elevates and comes up high as it goes towards Toejam Mountain? A. Certainly.

Q. Is not that the fact?

A. Natural raise in the country.

Q. There is a natural raise in the country up toward Toejam Mountain, isn't there? A. Yes.

Mr. PLATT.—That is all.

Mr. DENMAN.—(Q.) Would it be practical to build up that dam on that present damsite, and irrigate any of that Government land?

(Testimony of Drury P. Osborne.)

A. It would not.

Mr. PLATT.—Just one more question. (Q.) Do you know of any other reservoir sites for dams upon any of the lands indicated in the blue upon that plat?

A. That would only be how an engineer put them up, and the company that wanted to put up the money; I don't know of any that—I know of several reservoir sites, but whether it would be practical to put the money in to build the reservoir for what lands would come under the reservoir, that would be up to the people that owned the lands, and the engineers.

Q. Don't you know, as a matter of fact, there is a natural reservoir site about a mile and a half below the dam?

A. That would be according to the way the engineer would figure it out.

Q. I ask whether you know it; if you don't know it, say so?

A. In my own judgment it is not practical.

Q. Was it ever discussed between you and anybody? A. Never was.

Q. Well, did you figure out in your own mind a reservoir site about a mile and a half from that dam?

A. Well, I know where all them places are, and there is a place [187] where the canyon comes close together, but there is no territory behind to hold water, it is just in the canyon.

Q. But there is a place to build a reservoir there?

A. You can build a reservoir anywhere if you have got the money, it takes the mazuma.

(Testimony of Drury P. Osborne.)

Q. There is no question of building a reservoir there, with water?

A. No; of a good year no question of filling that whole Squaw Valley with water, of a good year.

Mr. PLATT.—That is all.

Mr. DENMAN.—(Q.) What do you mean by Squaw Valley?

A. That represents the little tail end; the Squaw Valley Ranch and the Squaw Valley country, that is no part of it at all.

Q. How large is the Squaw Valley Ranch?

A. The Squaw Valley Ranch has about 40,000 acres in it.

Mr. DENMAN.—That is all. [188]

[Testimony of William Willis, for the Plaintiff.]

WILLIAM WILLIS, called as a witness by plaintiff, having been sworn, testified as follows:

Direct Examination.

(By Mr. PLATT.)

Q. Just state your full name, Mr. Willis.

A. William Willis.

Q. Where do you live? A. Elko.

Q. What is your present occupation?

A. Well, you mean position or occupation?

Q. Do you hold any official position?

A. Yes. I am County Commissioner, one of the County Commissioners of Elko County, chairman.

Q. How long have you been a County Commissioner of Elko County?

A. This will be the fourth year.

(Testimony of William Willis.)

Q. You have been acting continuously then for four years in that capacity?

A. Not quite four, this will be the fourth year; a little over three years.

Q. Are you acquainted with what is known as the Squaw Valley Ranch of the Golconda Cattle Company? A. Yes.

Q. Have you ever been upon the property?

A. I have.

Q. I call your attention to a plat upon the black-board, Mr. Willis, and I will ask you whether you can identify the property and its location from that plat. You might step up and examine it.

A. I don't know whether I can or not, unless I can find the town of Midas there.

Q. I call your attention to the creeks indicated there, and to the watercourses, together with what purports to be the road leading from Midas, as I understand it, to Gold Circle.

Mr. DENMAN.—Midas to Gold Circle?

WITNESS.—Midas to Tuscarora. [189]

Mr. PLATT.—(Q.) How did you get your familiarity with that property?

A. Well, I have lived in that portion of the country for, altogether, off and on, for about 21 or 22 years, and hunted on Willow Creek below the dam; and then I was elected from that district, from Midas; and I mined in Midas, and travelled back and forth from Elko to Midas, and once or twice I would go through by way of the ranch, but principally go around the old road, and cross over Rock Creek, and

(Testimony of William Willis.)

leave the ranch off to my left, in going to Midas.

Q. Did you ever have occasion in your official capacity to visit the property?

A. Well, as Commissioner, you mean?

Q. Yes.

A. Well, I went there once to see Mr. Osborne.

Q. When was that, Mr. Willis?

A. If I am not mistaken, it was in the, along in May or June, of 1909, it may have been 1910, but I think it was 1909.

Q. Do you mean Mr. Osborne who was then foreman of the Squaw Valley property of the Golconda Cattle Company?

A. Yes, he had charge of the ranch up there.

Q. Did you have a conversation with him then?

Mr. LEWERS.—If the Court please, we object unless some better foundation is laid, because this is directed to a time prior to any period when it is alleged any fence existed that is now complained of, and I don't understand the purpose of the testimony. It may be that it is preliminary to something which is relevant, but any situation existing at that time obviously is not an issue before the Court at this time

Mr. PLATT.—If the court please, I am trying to lay the foundation, and will connect up this conversation with other conversations, bringing it up to after the time that this complaint was filed. [190]

The COURT.—I will overrule the objection for the present.

A. I did.

(Testimony of William Willis.)

Q. State generally whether or not the conversation pertained to the fence owned and controlled by the Golconda Cattle Company, and represented upon this plat by the exterior black and red lines.

Mr. LEWERS.—We object on the ground that there is no foundation laid for any such question, inasmuch as it already appears from the testimony of the Government, the fence to which Mr. Platt is now calling attention was not in existence at that time.

Mr. PLATT.—Well, it appears, if the Court please, that a part of that fence was in existence at that time.

Mr. LEWERS.—Then the question should be reformed.

The COURT.—It seems to me there was some testimony to the effect that the fence down in the triangle, running up Rock Creek and running up Willow Creek for a certain distance, was in existence in 1909.

Mr. LEWERS.—The posts were put up for part of that fence in 1909, and the wire stretched the following year, above there; there was some fence there, but Mr. Platt's question goes away up above, and the question is misleading. I would suggest that the witness be asked what the conversation was.

The COURT.—I will allow that question. He is asked if there was a conversation about the fence, but I don't think it is really necessary to put the dimensions of the fence in that question, because we will never get through if we try to be as definite as that. He will simply answer yes or no, whether there

(Testimony of William Willis.)

was a conversation about the fence.

Mr. PLATT.—The purpose is to lay the foundation for that conversation.

The COURT.—The question may be answered.

Mr. LEWERS.—We desire an exception. [191]

The COURT.—You may have the exception. Just state whether or not there was a conversation about the fence there or not.

A. Yes, I did.

Mr. PLATT.—(Q.) Now, I wish you would state what that conversation was.

A. Well, there had been complaints made—

Mr. LEWERS.—Now, if the Court please, we object to anything except the conversation.

The COURT.—Just state the conversation, just what your talk was. You need not state anything that led up to it; simply state what you said and what Mr. Osborne said.

A. I told Mr. Osborne that we would want him to remove a portion of the fence—I expect this place I am asked about now would refer to the gates on the road between Willow Creek and the ranch, crossing Rock Creek. There was a gate on either side of the road, and I cannot get at that, that was not the conversation. I had no conversation with Mr. Osborne at that time about those gates or about that fence.

Mr. PLATT.—(Q.) Did you visit the property at that time?

A. Later I did, but I had no conversation until quite a while later, I think it was in 1910 that I had

(Testimony of William Willis.)

the conversation with Mr. Osborne about the gates.

Q. What was the conversation in 1910?

A. That was simply,— I went over there with Mr. Osborne and Mr. Webb to point out what the county wanted them to do to remove those gates.

Q. What did Mr. Osborne say?

A. They said nothing about the gates. Nothing at that time, Mr. Platt.

Q. Did you have another conversation with him?

A. Oh, yes, sir; before this gate conversation took place.

Q. When did you have that conversation?

A. That was in the spring or early summer of 1909.

[192]

Q. And what was that conversation?

A. That conversation was about a fence, a piece of a road that had been fenced in, I think it is just northwest of the Ranch house, it is between the Ranch house and the town of Midas, the direction that the town of Midas was in; that was the first conversation I had with Osborne about any fences or roads.

Q. State what that conversation was.

Mr. DENMAN.—Object to that, on the ground it refers to a matter off this chart, and out of lands considered in this case, therefore is incompetent, irrelevant and immaterial.

Mr. PLATT.—It applies to the policy of the compsnv with reference to the monopoly of these lands.

Mr. DENMAN.—There has been no showing of a monopoly yet.

The COURT.—Whatever part of that conversa-

(Testimony of William Willis.)

tion related to this land I think would be admissible, but I don't want to open the door, unless it is absolutely necessary, to a consideration of conditions elsewhere, except right here.

Mr. PLATT.—(Q.) Can you indicate on the plat whether that conversation referred to any part of the fence as shown upon the plat?

A. I think not, no, sir. I think that first conversation related to a fence that was around here further (indicates) wherever the Ranch house is; if the Ranch house is there the fence would be off here.

Mr. DENMAN.—That is, off the southwest end of the map?

A. If I have got the map right.

Mr. PLATT.—(Q.) To what road did that conversation refer?

A. Related to this Squaw Valley—Golconda road.

The COURT.—Gentlemen, I think the easiest way would be to take the conversation, and then it can be stricken out, if necessary.

Mr. DENMAN.—(Q.) But it does refer to a portion of the road not on this map?

A. Yes. [193]

The COURT.—If it refers to any portion of the road on the map, that part of it I will admit, but I think the only safe way to do is to hear the testimony, and then strike out that which is not relevant.

Mr. PLATT.—Let us have the conversation then.

A. I went down and saw Mr. Osborne, and asked him to remove the fence that he placed across this road, and had fenced in a portion of the road, prob-

(Testimony of William Willis.)

ably, as near as I remember, about a half a mile of the old travelled road, and thrown the road up in the foothills. He had run a drag, or something of that kind, over the outside of the fence, and just took the rough sagebrush off, and the road was very badly travelled, and I wanted to have the fence taken off. There was no gates on this portion where the road was fenced in, and he said that it was on the company ground, and he would not remove the fence.

Mr. PLATT.—(Q.) Are you giving us the exact language?

A. That is as near as I can remember. That is just as near as I can remember his exact language.

Mr. DENMAN.—I move to strike out the conversation on the ground it is incompetent, irrelevant and immaterial, and not applying to any of the issues in this case; not showing any policy, other than they wanted to shift the road off their own land onto an adjoining piece of Government land.

Mr. PLATT.—I submit it is competent to show the tendencies of this company as to fencing off public highways, and keeping the community off public highways, and off their lands and Government lands adjacent thereto.

The COURT.—It don't seem to me that relates to this particular tract of land.

Mr. PLATT.—I expect to connect this up with another conversation that Mr. Willis had with Mr. Osborne; if I remember what [194] the facts are, concerning a portion of the fence near the dam, which is a succeeding conversation to this conversation, to

(Testimony of William Willis.)

which Mr. Willis has just testified. A conversation between the same people.

Mr. LEWERS.—May I inquire whether the second conversation you propose to ask about was a conversation whereby any effort was made to fence in a road which ran across Government land, or was it a piece of road which was on the land?

Mr. PLATT.—A piece of road which ran across their land upon Government land.

The COURT.—I am still of the same impression I was, but I will allow you to go on and put in your other testimony.

Mr. PLATT.—(Q.) Did you have any conversation with Mr. Osborne?

A. After this first one?

Q. Yes. A. Later on I did.

Q. And where did you have that conversation?

A. At the Ranch house, and on the road between the Ranch house and the crossing of Rock Creek.

Q. Was that conversation at or near the land or fence in question, as exhibited upon the plat?

A. A part of it was, yes; we were right at the Rock Creek crossing, where the road crosses Rock Creek, and through his,—well, there was two fences there, there was two gates.

Q. I wish you would indicate upon the plat just where the conversation occurred.

A. The second conversation took place along in here (indicates on plat); we were in the machine; this is the road, I believe, from Tuscarora to Midas and Golconda and the Squaw Valley Ranch, and we

(Testimony of William Willis.)

crossed Rock Creek running from the Ranch up this way, and crossed Rock Creek, I should judge a quarter of a mile from the end of the fence, there was a fence corner there, turned there and came back; and the second conversation [195] occurred between the Ranch house and this point, I should judge it would be somewhere in here (indicates on plat).

Q. Was that conversation concerning any part or portion of the fence indicated there upon the map?

A. It was.

Q. What was that conversation?

A. Well, the conversation was to decide on what to do about the gates across the road; on either side of Rock Creek there were two gates, one on either side of Rock Creek, and Mr. Osborne and Mr. Webb, who was there at the time, agreed to take those two gates down, and put a lane, or put a fence on either side, and make a lane along between where the two gates stood.

Q. I wish you would state as nearly as you can, the exact language that Mr. Osborne used during that conversation.

A. I think that was during the first conversation.

Q. During the first one?

A. During the first conversation about the other portion of the fence.

Q. What was that?

Mr. DENMAN.—By the other portion of the fence you mean what?

A. This other fence; this fence opposite, close to the Ranch house.

(Testimony of William Willis.)

The COURT.—(Q.) That is where he wanted to change the road from their land to the Government land?

A. That is where they had changed the road; they had fenced that part of the road in.

The COURT.—I think I will exclude that conversation.

Mr. PLATT.—If the Court please, it seems to me if the superintendent of a company makes a declaration to a county official that he will do thus and so in the event anybody interferes at all with the fences of the Golconda Cattle Company, and makes a statement so comprehensive that it must include all the fences [196] owned by that company, it seems to me that such testimony should not be restricted because the particular fence was not mentioned in the conversation, or because the conversation did not take place upon the line of the particular fence.

The COURT.—(After discussion by counsel.) (Q.) Mr. Willis, during that first conversation, were you discussing this new road that he had built?

A. Yes.

Q. That was all you were discussing?

A. That was all at that time.

Q. And were you intimating that the county would have to compel them to take that fence away?

A. Yes, sir.

The COURT.—I think I will exclude the conversation.

Mr. PLATT.—(Q.) You started in to narrate a conversation which you had along the line of the

(Testimony of William Willis.)

fence as shown upon the plat; now what was the extent of that conversation?

Mr. LEWERS.—I submit that has been answered; he has testified to what was said about removing the gates; and Mr. Platt then asked whether certain language was used.

The COURT.—(Q.) Have you detailed the whole of that second conversation about the lane crossing the territory between the two creeks, Willow Creek and Rock Creek.

A. No I have not. There was considerable conversation from the Ranch house up, which was all included; it was mixed up together, about the lower fence where the road had been thrown out, and also about these gates across Rock Creek; it was a general conversation.

The COURT.—Give us the conversation about the Rock Creek gates.

Mr. PLATT.—I forgot it, but will your Honor give me an exception to the ruling of the Court on the last objection?

The COURT.—Certainly. [197]

A. There was scarcely any conversation at all. I met Mr. Webb in Elko, and the purpose was to go over there and fix things to suit the county; he asked me to come over and point out what we wanted done, and he would meet me in the machine at the Ranch house, and go out. We did, and I pointed out what we wanted done, and he said he would take the gates off—Mr. Osborne was in the machine—that they would take the gates off, and put a fence up on either

(Testimony of William Willis.)

side, and make a lane of this crossing, the Rock Creek crossing. And the others would relate to the other road; that was all that related to the gates across Rock Creek. They took the gates off, and we had no further trouble.

Mr. PLATT.—(Q.) Did you ever have any conversation about any other gate upon any of these lands shown upon the plat?

A. No, never had any conversation with them about any other gate; I took the other gate off myself without any conversation.

Q. Where did you take the other gate off?

A. Well, the other gate would be about, I think it is about four miles above the reservoir in the Tuscarora direction that is just making a rough guess at it; it would be right where the road came out of the hills onto Willow Creek, or somewheres near there.

Q. About when did you take the gate off?

A. That would be in 1910, in October, 1910.

Q. And was the gate placed relatively across the road? A. The gate was directly across the road.

Q. Directly across the road?

A. Yes; that is, it may have been—it was a large gate, and as I remember now the road ran very close, the wagon tracks ran very close to one post, leaving quite a space of ground on the other side, between the other post.

Q. State what you did in taking the gate off.

A. Well, I had another one of the Commissioners along with me, and when we drove down from Tusca-

(Testimony of William Willis.)

rorra, that is the first I had [198] known of any gate being across that portion of the road; the gate was closed, and there was a chain around it with a padlock through the links of the chain, but it was not locked; there was a notice, big notice, "Shut the gate." Well, we had been having this trouble, so I said to Mr. Moody, who was the other Commissioner, we will stop here and take that gate off, and put it up alongside of the posts; it took us about an hour to get the gate off and moved, a big heavy gate; but we got it off, and drove through, and didn't close the gate afterward.

Q. Did you ever have a conversation with Mr. Osborne about that gate afterward?

A. Never had any conversation with any of the men over there about that gate.

Q. Was there any other entrance into the field very near there, except through that gate?

A. Well, you could get in there, yes. As I remember it now, the wires were not connected up to the gate-posts.

Q. At that time?

A. At that time; the wires were down on either side, on both sides, I think.

Q. As I understand it, the posts were built for the purpose of putting the wires up?

A. The posts had been set there, but the wires had not been strung on the posts yet; but to get through there you would have to drive out in the sagebrush, off of the road, to get through. Now, I may be mistaken about that, there may have been wires come

(Testimony of William Willis.)

up on one side, but as I recollect it, I don't think that the wires connected with either gate-post.

Q. You don't remember whether that was in September or October of 1910, do you?

A. It was October, I am pretty sure.

Mr. PLATT.—That is all. [199]

Cross-examination.

Mr. LEWERS.—(Q.) That was during the campaign? A. Yes.

Q. Mr. Moody and you were out campaigning, weren't you? A. Yes, sir.

Q. And have you been at that point since?

A. Yes.

Q. There is an opening of about a half a mile there, isn't there?

A. The last time I was there there was some posts, that is all I saw.

Q. When was that?

A. I was over there, I think, last October, the last time I have been there.

Q. October, 1911? A. Yes.

Q. You mean there were some posts at the place where the gate had been?

A. Where the gate had been.

Q. There was no gate there?

A. No, I didn't notice any gate.

Q. Did you notice any fence there?

A. I didn't notice any fence; I noticed things had been torn down, and the wire taken off; when I got down a little further I found a fence alongside of the road, which was new to me, down beyond the reservoir.

(Testimony of William Willis.)

Q. The road down there beyond the reservoir was changed, was it not, as the result of a petition which was filed to make the change?

A. It was changed below the reservoir.

Q. The Board of County Commissioners granted that permission on application, didn't you?

A. Yes.

Q. When you drove down there, did you drive over to Midas on that occasion?

A. Yes, I went over to Midas.

Q. Did you go through any gates in doing so?

A. No, didn't go through no gates.

Q. The road was open all the way through?

A. The road was open all the way through, with the exception of one place down by the Ranch house, that was not included in this fence, I believe. [200]

Q. Did Mr. Webb fulfill his promise with reference to that lane down at the lower end?

Mr. PLATT.—Object, if the Court please, on the ground there is no testimony here showing that Mr. Webb made any promise, and even if there were any testimony it would be incompetent, irrelevant and immaterial. It has not been shown that Mr. Webb was a representative of the company, or had any authority to act for the company.

The COURT.—I suppose the only thing you want is the fact, whether he went through a lane crossing the premises, and that would be perfectly relevant, the condition of that road, as it crosses the territory in question here, and whether he went through a lane or not. It is not shown that Mr. Webb was an

(Testimony of William Willis.)

official of the company, is it?

Mr. LEWERS.—No. The statement was made that Mr. Webb, in the presence of Mr. Osborne, promised to take down the gates, and put the fence along the line. (Q.) Was that done immediately afterwards?

A. It was done before I went over the next time. The gates were taken down when I was there the following spring, the wires were strung on both sides of the road, making a lane there.

Q. There was a lane running through there then, without any gate? A. Yes.

Q. Do you know who Mr. Webb was?

A. I knew he was connected with the company. I didn't know what position he held.

Q. He appeared before the Board of Commissioners in Elko in connection with that matter?

A. No, he didn't appear before the Board.

Mr. PLATT.—We object to that as improper cross-examination. If I may be permitted to introduce testimony of the complaints [201] that came to the Board of County Commissioners, I have no objection to permitting counsel to examine along that line.

Mr. LEWERS.—It is merely to ascertain whether Mr. Webb had anything to do with the matter prior to the conversation on the ground.

The COURT.—I think I will sustain the objection.

Mr. LEWERS.—That is all.

Mr. PLATT.—That is all.

By the COURT.—(Q.) Mr. Willis, did you pass

(Testimony of William Willis.)

through a lane from Willow Creek to Rock Creek, the whole distance? A. No, sir.

Q. How much of that distance was covered with the lane?

A. Oh, I don't think there was over, well, not over three-quarters of a mile. The lane started, began there close to Rock Creek, on the west side of Rock Creek, and it ran towards Willow Creek, but just for a short distance, might not have been a half a mile.

Mr. LEWERS.—There is another question we might straighten out in connection with that lane matter. (Q.) On the other side below the Willow Creek dam, the last time you went through there, there was another short lane, was there not?

A. No, the lane was on the outside of that fence.

Q. Where the road turns to go on the outside of that fence, was there the last time you went through there, any lane there? A. No lane there at all.

Q. What sort of an opening was there there?

A. There was no fence to go through, the fence was on the right.

Q. The question I want to get at is this—

Mr. PLATT.—I would like to have the last answer read.

(The reporter reads the record.)

WITNESS.—You asked me just below the dam?

Mr. LEWERS.—Yes, just below the dam. [202]

Mr. PLATT.—(Q.) As I understand, there was no opening in the fence there?

A. Oh, yes, there were gates there; but on petition they had changed the road, and put it outside. If

(Testimony of William Willis.)

I had followed the old road, I would have had to have gone through these gates, but we granted the petition to put the road on the outside of that, on the outside of the fence; and there was a road inside of the fence, where they had been hauling in supplies up to the dam.

Q. Then the main road, as I understand it, was not running through the fence?

A. No, the new road was on the outside of the fence.

Mr. LEWERS.—I suggest that I be allowed to examine the witness.

Mr. PLATT.—I interrupted for the purpose of trying to straighten the witness out.

Mr. LEWERS.—(Q.) In coming from Midas, or from Tuscarora, I understand you crossed Rock Creek through a lane? A. Yes.

Q. Somewhere from a quarter to half a mile long?

A. Somewhere.

Q. A short lane? A. A short lane.

Q. After you got beyond that, you followed the Tuscarora road until you got pretty near up to Willow Creek dam? A. Yes.

Q. In any portion of that were you within a lane, or were you in open country?

A. That was all open country, as far as I could see from the road.

Q. When you got up here pretty near to the dam, I understood you to say that the old road ran up inside the fence? A. The old wagon road did, yes.

Q. But that permission had been granted by the

(Testimony of William Willis.)

Board of Commissioners to move that road to the outside of the fence at that point? A. Yes. [203]

Q. And when you went there the last time you drove to the outside and went up the new road, did you? A. Went up the new road all the way.

Q. Without any obstruction of any kind?

A. No obstruction at all.

Mr. LEWERS.—That is all.

Mr. PLATT.—(Q.) There was no obstruction because the new road was on the outside of the fence, wasn't it? A. Yes.

Mr. PLATT.—That is all. [204]

[**Testimony of E. C. McClellan, for the Plaintiff.**]

E. C. McCLELLAN, called as a witness by plaintiff, having been sworn, testified as follows:

Direct Examination.

(By Mr. PLATT.)

Q. What is your full name?

A. Edward C. McClellan.

Q. Where do you live? A. Elko, Nevada.

Q. What is your profession or occupation?

A. Surveyor.

Q. How long have you been engaged in that?

A. Thirty-four years.

Q. Are you acquainted with what is known as the Squaw Valley Ranch of the Golconda Cattle Company? A. Tolerably well acquainted with it.

Q. When did you first become acquainted with it?

A. I became acquainted with it in travelling through the valley in 1884, I think it was, the first time.

(Testimony of E. C. McClellan.)

Q. Had you any association with the property in the capacity of a surveyor? A. No, sir, never.

Q. Had you occasion at any time to examine any part or portion of the company's fences in connection with any employment there by the company or anybody else? A. I did.

Q. When was that? A. In 1910.

Q. About what month, if you remember?

A. I think it was about July or August, but I cannot remember the exact time, and I have not my note-books here in regard to the work.

Q. By whom were you employed?

A. By George Russell Company.

Q. What part or portion of the fence of the Golconda Cattle Company engaged your attention at that time?

A. Along the south side of Willow Creek, above the reservoir a few miles, and along the east side of Siawappe Creek.

Q. Have you had occasion yet to examine Government's Exhibit No. 1?

A. I glanced at it yesterday noon, but I didn't examine [205] it very closely.

Q. Will you kindly look at that plat, and ascertain whether you can designate the portion of the fence which engaged your attention.

A. The portion that engaged my attention positively was the line fence between the George Russell land and the Golconda Company's land, or that was supposed to be between the two tracts of land; that was commencing at a point in the south half of sec-

(Testimony of E. C. McClellan.)

tion 29, and extending to the northeast corner of section 17, in township 39 north, range 49 east.

Q. Did you make an actual survey of that land?

A. I did across those places; that is, from the south side of 29 to the northeast corner of 17; I made a resurvey of that.

Q. To what did you tie?

A. I tied to the quarter section corners between 17 and 20, and between 29 and 30. I looked for the northeast corner of section 17, but did not find it. In tying or finding the quarter section corner between 29 and 32, it was necessary for me to retrace the Government survey from the corner to 1, 2, 35, 36 in townships 38 and 39 north, range 48 east.

Q. Can you state whether or not that portion of the map to which you have pointed is an accurate representation of the fence at that particular place?

A. It seems to be very nearly as I found it when I was there.

Q. I call your attention, Mr. McClellan, to a portion of the fence from a point on the intersecting line in the north half of section 20, township 40 north, range 49 east, extending up to a point at the intersection of Nelson's fence, and will ask you at the time that you made the survey, whether there was in fact a fence at that place, or between those points?

A. There was a fence from the point you speak of in section 20 to a point about a quarter of a mile south of the northeast corner [206] of section 17, the posts were up and the wires stretched; from that point on up to its connection with the Nelson fence,

(Testimony of E. C. McClellan.)

posts were set, but no wires stretched; the men were working stretching the wire the day I was there.

Q. As I understand it, a part of that was up, and part had not been completed?

A. Yes, sir, about $\frac{2}{3}$ of it was up.

Q. I call your attention to that portion of the black line on this plat from a point right between section 31 and 32, and extending relatively to a point in the southern half of section 36, and I will ask you whether there was a fence constructed there or not?

A. Yes, sir.

Q. At its full length between those points?

A. There was one little space there of a few hundred yards that I didn't see, but the balance of the distance along the fence I saw, and it was up.

Q. At that time, Mr. McClellan, did you make any general observation as to the condition of the fences of the Golconda Cattle Company?

A. Only in so far as the fence was upon the Russell land.

Q. Had you at that time any conversation with any representatives of the Golconda Cattle Company? A. No, sir.

Q. Did you make an investigation to ascertain whether any part or portion of the fence of the Golconda Cattle Company at that time was on Government land or not? A. No, sir.

Q. Do you know, as a matter of fact, whether you observed any?

Mr. DENMAN.—Object to that as calling for a conclusion of the witness, as to whether or not the

(Testimony of E. C. McClellan.)

land was Government land. There has been no showing of title here.

The COURT.—If he knows, he can answer; if he does not know, he need not answer.

Mr. DENMAN.—It calls for a conclusion. [207]

A. I can tell about where the fence line was in connection with the Government lines as I found them, but whether the land was Government land or private land, I do not know.

Mr. PLATT.—(Q.) I wish you would indicate upon the plat.

A. The fence line was a nearly east and west line, was somewhere about a quarter of a mile, or less, north of the township line between townships 38 and 39 north, in ranges 48 and 49 east, as far as I went. That is, in running from my starting-point on the west side of Willow Creek, the corner to sections 1, 2, 35 and 36, I ran two miles easterly on the township line, and for a mile and a half, about, I could see the fence to the north of me, the posts standing, and the wire stretched on the fence. About that point the fence turned to the northeasterly; I continued east half a mile farther, and there was a short distance that the fence was out of my sight entirely. From that point I ran north between sections 31 and 32, and came in sight of the fence again, crossing it at the quarter section point between sections 31 and 32, there the fence was bearing about northeast and southwest. There was a short space there, from that quarter section corner southwesterly, that I didn't see the fence, but before that and after that, I was

(Testimony of E. C. McClellan.)

within sight of the fence all the way.

Mr. PLATT.—That is all.

Cross-examination.

Mr. DENMAN.—(Q.) You don't know what openings there were in that fence in the part you didn't see? A. No, sir.

Q. Now, let me ask you, you are familiar with the territory in there, aren't you, in that neighborhood?

A. Yes, sir.

Q. Where do the cattle come into that country that are working north in the springtime from the country to the south? [208]

Mr. PLATT.—Object on the ground it is improper cross-examination.

Mr. DENMAN.—Well, I will take the witness then.

The COURT.—You make this your examination in chief, then?

Mr. DENMAN.—Yes, if there is any question about it.

A. The cattle would drift in—

Mr. PLATT.—I would like to have the question read.

(The reporter reads the question.)

Mr. PLATT.—Object to the question on the ground it has not been shown that this witness has any knowledge of any cattle, or their tendencies, or where they cross. And upon the second ground, if the Court please, that the time of the crossing of the cattle has not been specified in the question.

Mr. DENMAN.—Spring.

(Testimony of E. C. McClellan.)

Q. How many times have you been through that country?

A. Oh, I have been through that country a great many times; I could not state exactly, but between 1884 and last year, a dozen or 15 times.

Q. Are you familiar with the topography of the country in general? A. Yes, sir.

Q. Have you seen the cattle working through that country? A. I have.

Q. How many years have you lived in Nevada?

A. Forty-two years; nearly 43.

Q. In what capacity?

A. Well, I came here as a boy, and I worked on my father's ranch, he had a stock ranch near Reno, and I worked until I started surveying, and I have been in a surveying capacity ever since.

Q. Cattle ranches?

A. Principally cattle ranches.

Q. Laying out fences?

A. Laying out fences, and selecting land for cattlemen.

Q. Designing pasturage, and— [209]

Mr. PLATT.—I think we have had enough leading questions.

The COURT.—This is preliminary.

Mr. DENMAN.—(Q.) Are you sufficiently familiar with this country to tell the general movement of cattle? A. I am.

Mr. PLATT.—Object to that, and ask the answer be stricken out, on the ground the question calls for a conclusion as to his familiarity.

(Testimony of E. C. McClellan.)

Mr. DENMAN.—He said he had been in there a dozen or 15 times, knew the topography of the country, and the cattle moving in there.

The COURT.—I will allow the question.

Mr. PLATT.—Note an exception.

Mr. DENMAN.—(Q.) Can you tell me through what portion of the country south of this general map here, the cattle coming from the south in the spring-time would naturally pass in, working up to the higher country beyond; where would they come up?

A. They would come up—

Mr. PLATT.—Object to the question on the ground it calls for a conclusion or opinion of the witness.

Mr. DENMAN.—That is very true, but it is an opinion of a man who knows the topography of the country, the same as we have in maritime practice.

The COURT.—(Q.) Do you know, Mr. McClellan? A. Yes, sir.

The COURT.—I will overrule the objection.

Mr. PLATT.—Exception, if the Court please, on the grounds stated in the objection.

The COURT.—Let the exception be entered.

A. They would come up and strike Willow Creek, between Hot Creek and the point where the creek turns to the north, principally at the point where it turns to the north, and where the road shows, I suppose that is the road—no, it is not—but there is a road that runs in and drops onto the creek, just below the northeast [210] of the quarter section

(Testimony of E. C. McClellan.)

corner, they would come right in that strip of country there for about three miles.

Q. What can you say as to the topography of the country right about this space near Opening No. 6, and to the south generally, with reference to its being a valley or precipitous, or what it is?

A. Well, that is valley land there. Opening 6, that is right on the valley, it is right in the valley.

Q. And is that a place where cattle would naturally congregate? A. That is a watering place.

Mr. PLATT.—The same objection.

Mr. DENMAN.—(Q.) And from there where would the cattle work?

The COURT.—The objection is overruled. You may have the exception.

A. They would work, some of them up the creek, some would cross the creek and work up on north, to the west of the creek.

Q. What is the natural trend of the cattle in the springtime with reference to direction of travel?

Mr. PLATT.—Same objection.

The COURT.—Same ruling and same exception.

Mr. DENMAN.—(Q.) The cattle that are in Humboldt, Humboldt Valley?

A. The trend is to the north.

Q. Now, can you tell us in general what the topography of the country is around Toejam Mountain? Have you been up into that section there?

A. I have been all over that country.

Q. What, in general, can you say of the country to the northeast of a line drawn from North's fence to Nelson's fence?

(Testimony of E. C. McClellan.)

A. I don't know where North's fence is, unless it shows on the map. I have never been over there since that fence was constructed, and I have never been over to the Nelson fence, and the south line of that fence, where it extends to the northwest, never been exactly to that fence, but I can give you a general idea of the [211] country through there.

Q. Well, what is the character of the country?

A. It is a high table-land country. On the north side of Siawappe Creek, as it is now called, and from there over to the south fork of Rock Creek, that is called Toejam Creek, there is a high ridge, reasonably smooth, grassy table-land, all ridge, the mountain itself, that is, the main mountain, lies about 3 or 4 miles east of there.

Q. Good grazing country? A. Splendid.

Mr. DENMAN.—That is all. Take the witness.

Redirect Examination.

Mr. PLATT.—(Q.) Have you ever been up in the country indicated on the plat as Toejam Mountain?

A. Yes.

Q. What is the condition of the country?

A. That is the country I was speaking of. That that is marked as "Toejam Mountain" is a ridge lying between Toejam Creek and Siawappe Creek, that extends easterly and westerly, bearing a little bit south of west.

Q. How high is the ridge?

A. Oh, I should judge from the Siawappe Creek up to the summit, it must be a good thousand feet high. It is a mile and a half, I think, from the creek

(Testimony of E. C. McClellan.)

to the top of the ridge.

Q. It would not be a natural place for cattle to graze over, would it?

A. It is all fine grazing land there; they do graze over it.

Q. Is it a natural course for them to take, and graze over it?

A. Yes, that is the course they take when they get up in there and graze around, or would if allowed to do as they please, graze around Siawappe Creek, cross along the north side of that creek [212] and drop over onto Rock Creek, and Toejam Creek, as it is called.

Q. You say they would graze there if they ever got up there?

A. They get there; I have seen them there.

Q. Is it a natural place for cattle, a natural trail for them?

A. Not exactly a natural trail; they are on the summer range when they get up in there.

Q. Which direction do they come?

A. From the south.

Q. Always from the south?

A. Some come from the southwest, or from Squaw Valley, the cattle that belong to the Squaw Valley outfit would naturally come from a west or southwest-erly course; cattle that come from other people on the Humboldt, they would come from the south; they come up Antelope Creek to Boulder Creek, into that country.

Q. You never heard of any cattle coming from the

(Testimony of E. C. McClellan.)

northeast over the mountain, did you? A. No, sir.

Q. And you are very familiar with that country, aren't you? A. I am.

Q. It would not be a natural course for them to take, would it?

A. Yes, the cattle that are to the northeast, over in Independence Valley, don't cross that high mountain unless they are driven across, or forced across through lack of food.

Q. They would have to be driven or forced in some way?

A. They come over the mountain that lies about 4 miles east of this country.

Q. In other words, as I understand your testimony, it would be comparatively easy for cattle to get out of this so-called inclosure up over the mountain, but it would be very difficult for cattle to get in, coming from the northeast?

A. Well, of course, that inclosure, I don't know where it extends; if the North fence extends across to this point (indicates) and the Nelson fence connects there, they could not get down from [213] the northeast; they could not come in there at all; they would be effectually barred.

Q. By the fence?

A. By the fence, yes. But if there is no long fence, this being a smooth ridge, well grassed, unless they are kept out by persons driving them off, or by sheep keeping them off of there, they can drift down that way in the fall of the year, or used to when I was there. The last 10 or 15 years I have not been up

(Testimony of E. C. McClellan.)

there in the fall, but before that I have been there in the fall of the year, and I know the cattle drifted down through there, all through that country, drifted down to the southwest.

Q. Didn't you just testify that cattle never came over from the northwest, down the southwest, over the Toejam Mountain, unless they were forced, or unless they were driven?

A. They don't come over that mountain from Independence Valley, but these cattle that drift in the spring of the year, and drift to the north, in the fall they drift back south, and then they come over and practically retrace their steps to the high mountain, and the best of the grass, you might say the finest grass, is farther east than north, or northeast from this place.

Mr. DENMAN.—That is, you mean—

A. Off of this map.

Mr. PLATT.—(Q.) I would like to have you explain your answer when you stated that cattle coming from the northeast, and going in a southwesterly direction over the Toejam Mountain, never in your experience, and within your knowledge, had come over that mountain from the northeast, going southwest, unless they had been forced or driven, or unless, I think you said, they were not getting much to eat, or words to that effect. A. I did not say that at all.

Mr. LEWERS.—I was going to object; it was a misstatement of [214] the witness' testimony, but the witness understands it.

A. What is marked on this map as the Toejam

(Testimony of E. C. McClellan.)

Mountain is a ridge laying between the south fork of Rock Creek and Willow Creek; the main mountain itself is several miles to the east of here, that these streams head in; that mountain is running north and south; Rock Creek and Willow Creek head in the same mountain, flowing parallel to each other; but Toejam Creek and Siawappe Creek are two or three miles apart, and flowing there for five or six miles parallel to one another, before you reach this map; then Siawappe Creek turns to the south, and Toejam Creek continues west, and in turning to the south they separate; that is, Siawappe Creek turns south and separates from Rock Creek, and forms the tract of country that is shown on this map. But before they reach the lands shown on this map they have been flowing alongside of each other for several miles. What is called Toejam Mountain, as I have stated, is a ridge between the two creeks, that is perhaps a thousand feet high, a grassy ridge; at one point between the two there is a small lake.

Q. When did you last see that country around Toejam Mountain?

A. I last saw that in 1910, when I was up surveying for the George Russell Company.

Q. During that year or the year 1911, did you see any cattle go over the part of the country indicated on the plat as Toejam Mountain?

A. No, I didn't see any cattle going over there; I was only there one day, or two days, within sight, you might say, of that ridge. One day I retraced this line, located a fence line; another day I came in from

(Testimony of E. C. McClellan.)

the southeast, and caught the Nelson fence, and re-traced that fence about five miles east, and then north-easterly to the summit of the mountain.

Q. Have you any familiarity, Mr. McClellan, with the portion of the country near the western line of the map? [215]

A. Only as I was over it, I think, in 1884, was pretty near the last time I was over it.

Q. Had you been over it before that time, more or less?

A. Simply travelling over it with a team on the road.

Q. Do you know anything about cattle travelling from the west easterly across that country?

A. When I was there the cattle travelling from the Clover Valley, or Evans Creek in Clover Valley Ranch, and the cattle belonging to the Squaw Valley Company, ranged north and east from Squaw Valley.

Q. Did you ever see cattle migrating across the part indicated upon the plat in white?

A. No, I cannot say I ever saw them migrating across there; I have seen them feeding up there, or seemingly feeding; I have seen them at a distance over here, and I supposed both horses and cattle up there were grazing over the country.

Q. You have seen them many times, have you?

A. Almost every time I have been in that country.

Q. Are you familiar with all migration of cattle from the north in a southerly direction?

A. Well, yes, I have seen and can tell from the

(Testimony of E. C. McClellan.)

trails the cattle running southerly, that is, coming from the mountains up north, they come southerly until they strike Rock Creek, and then they naturally follow the lines of the easiest travel; they follow down Rock Creek; that is, when migrating or travelling, they don't travel across the country from Rock Creek to Willow Creek. The only trail I ever noticed was cattle feeding in there, and when they started to go down to water, formed a trail going down to water; I have never seen any trail that went continuously across.

Q. You never examined the country to find trails?

A. I was not looking for them, no; but I am generally of an observing nature, and if I run across a trail that seems to be very [216] distinct, I generally try to judge what it is made for, what cause.

Q. But as I understand it, you have seen cattle cross many times within this white inclosure?

A. Yes, sir, I have seen cattle crossing in there, and horses. I have seen from a distance sheep in that country, towards the northeastern part of it.

Q. As a matter of fact, what kind of country is that in there?

A. It is a rather high rocky bench land, with scattered sagebrush; some places the sagebrush is rather thick, where it seems as though the soil is better than in other places, and considerable grass.

Q. There is considerable grass there?

A. Yes, sir.

Q. Does it extend pretty generally all over this Government land here? A. Yes, sir.

(Testimony of E. C. McClellan.)

Q. What kind, would you designate it as grazing land?

A. I would designate it as spring grazing land.

Q. Spring grazing land?

A. Yes, sir. The grass is of a character that seems to be very nutritious, and stock like it in the spring. I have been over that ground late in the fall when the grass seemed to have dried up, and a good part of it almost blown away; that is, you would not see that the grass was there; you would have to look pretty close to see that the roots were in there.

Q. But in the spring it seemed, you say, nutritious and plentiful?

A. Good feed there, yes, sir; quite a lot; not as good as further east in the higher table bench, or in the mountains, but still good feed.

Q. Where do the higher lands begin, relatively, within this, or upon the Government land indicated upon the plat?

A. The higher lands begin at the northeast corner on the divide between Siawappe Creek and Toejam Creek; and the ridge or divide [217] is extending towards the northerly part of the tract of land, nearer the Rock Creek side than the Willow Creek side; it has a gentle slope to the south, but the ridge being farther north, it is steeper going to Rock Creek than to Willow Creek; the slope is gentle raising from Rock Creek, and extending up until you get within half a mile or so of Willow Creek, then it is tolerably steep down to the Creek. At the lower end, or southwest end of the tract, the land is quite low as com-

(Testimony of E. C. McClellan.)

pared to the northeast corner.

Q. Is the land tending toward the center of the Government land as shown upon the plat, very much higher than the land along the creeks?

A. Yes, it is considerably higher, several hundred feet.

Q. Several hundred feet? A. Yes, sir.

Q. But it gradually slopes down, as I understand it?

A. It gradually slopes down until you get within a half or quarter of a mile of the creek, then the slope is steeper. Rock Creek on the north is a great deal higher in elevation than Willow Creek to the south, while it is quite a steep slope from Rock Creek up to the top of the ridge as it extends along here, (indicating), then there is a long, gentle slope here for two or three miles before it commences to slope steeper, and that makes a bench in there, with a gradual slope to the south.

Q. And that is true particularly as to the central portion of this?

A. Yes, down in the southwest corner, it is lower and more even, the two creeks are getting more to the same elevation.

Mr. PLATT.—That is all. [218]

Recross-examination.

Mr. DENMAN.—(Q.) You say that the cattle if they came in from the north would naturally range down about this blue line here? A. Yes.

Q. Would not go to the Government land naturally? A. They don't cross there to the south, no.

(Testimony of E. C. McClellan.)

Q. What about the character of the soil in here on these bottoms, in the blue line, say running from North's fence to Opening No. 1; what is the character of that soil?

A. From North's fence to six miles west, the soil is poor, the bottom is very narrow, and it is a washed, gravelly, rocky soil, the same character of soil that the bench land is to the south.

The COURT.—Is that for six miles, you say?

A. About six miles west from North's fence; the valley opens out and the character of the soil changes; it is more of a loamy washed soil from that on down.

Mr. DENMAN.—(Q.) Let me ask you, are you certain as to this, have you been on that recently enough to be certain as to that line running from 36 to 34?

A. The last time I was along in there was, I think, in 1885.

Q. In 1885?

A. But I am certain enough of it to say yes. It is a narrow bottom of soil along there, right in the bottom itself is all right, that is good soil, but it is a narrow bottom, it is not very wide.

Q. Well, a quarter of a mile?

A. Well, a quarter of a mile would cover it, some places might be a little bit wider, but not very much.

Q. In that actual bottom the soil is good?

A. Oh, the soil is all right on the bottom. On Willow Creek, from the junction of Siawappe Creek and the main Willow Creek, on [219] down, there is a good soil on down to its junction with Rock Creek.

(Testimony of E. C. McClellan.)

Q. In this territory there between this fence running west six miles, you say the rich soil is confined about a quarter of a mile in the bottom? A. Yes.

Q. But outside of that, is that gravelly soil?

A. Outside of that is this gravelly wash soil.

Q. Do you know who ranges sheep in this country here, in this Government territory here?

Mr. PLATT.—Well, if the Court please, I object to the question, because it does not state any definite time; I don't know whether he means ranges them now, or 20 years ago.

Mr. DENMAN.—(Q.) You said you saw sheep ranging in here, in response to Mr. Platt's question?

A. Yes.

Q. Whose sheep did you see in there?

A. I was informed they were Tom Nelson's sheep.

Mr. PLATT.—I ask the answer be stricken out on the ground it is hearsay.

Mr. DENMAN.—We consent. That is all.

Mr. PLATT.—That is all.

By the COURT.—(Q.) What is the average width of the bottom along Willow Creek?

A. For the first four miles from its junction Willow Creek and Siawappe Creek, the bottom will average between a quarter and a half a mile; below that it broadens out; it is a good half mile, half to three-quarters of a mile wide, for about three miles; it narrows down into a canyon then for two or three miles, and I believe the average width would be less than a quarter of a mile. After that it broadens out, and widens from a quarter of a mile in width to three-

(Testimony of E. C. McClellan.)

quarters of a mile or a mile, down towards Squaw Valley, gradually opening out into Squaw Valley itself. [220]

Q. I wish you would go down Rock Creek the same way.

A. Rock Creek for the first six miles from the North fence, will average perhaps a quarter of a mile, well, it may average a quarter of a mile, it will be a short quarter of a mile; it won't average that, I don't believe, less than a quarter of a mile; then it widens out, the creek follows the line of bluffs on the south or southeast side of the creek, and on the opposite the slope is very gradual to the northwest and north; and for about four miles it is gradually opening out into Squaw Valley. The width of the bottom is a half a mile or more, then it opens into Squaw Valley proper, and it is hard to tell what the original width of the bottom itself is, but I think pretty near a mile along there. It has been all put under cultivation and irrigation through there, and a person would have to look closely to find where the original bottom ended and the slight slope up began of the cultivated land.

Q. What is the course of the Toejam ridge?

A. The Toejam ridge course is easterly and westerly.

Q. Due east and west?

A. Almost due east and west; from the northeast corner of this plat it extends nearly due east between those two creeks, for pretty near from four to five miles. Upon this tract shown on the plat, from the

(Testimony of E. C. McClellan.)

northeast corner it is bearing more to the south of west, gradually turning, until the ridge is running almost due southwest; that is, it is turning from the northeast corner, extending along the north side of the tract in a southerly direction, and then running southwest, gradually running out to nothing, where it strikes Squaw Valley.

Q. Did I understand the top of the ridge on the northeast corner of the map is smooth?

A. Yes, sir, smooth, of course there are rocks there, a rocky ridge.

Q. Would it be passable for wagons? [221]

A. Well, it is pretty steep, I suppose a person if they had teams enough could pull up the ridge, but it is a tolerably steep ridge to get up from the creek up there. By starting out lower down, out on Siawappe Creek, you might say about a mile to the southwest of the Nelson fence, you may work up there, and get on top of that bench, and then follow the ridge right up and strike Willow Creek below there, and work up this bench land, and go right up there, until you strike the mountain, that is about four miles east of the land shown on this plat.

Q. There is another mark on the map below Toejam, and I think it is marked as a barrier; do you know anything about that?

A. That is a point where the canyon is narrow, and it is a pretty steep rocky bluff to go down, to get down onto the creek from the south. Yes, I have been along there.

Q. Would cattle naturally go over it?

(Testimony of E. C. McClellan.)

A. No, they would either drift a little farther east, and drop down where it is not rocky, or else they would drift to the west and come onto the creek below.

Q. Do I understand you that in crossing the Toejam Mountain, or ridge rather, between the two creeks, that cattle would go directly north across there, or would they go to the northwest, and get on the ridge, and then walk up the ridge?

A. The natural way for them to drift, if they were heading for the north, positively with the idea of getting there, would be to go to the northwest, and then bear off to the northeast or northerly, or westerly.

Q. Follow the ridge up?

A. Yes, follow the ridge up. That would be the natural way they would do; but generally cattle, particularly when they are moving, after they get upon a range they are not travelling very much, except as they feed; they are [222] travelling to water, to perhaps a little distance, until they get back to the feed, and then they work back and forth all over the country, without travelling, you might say; but of course take it in the fall of the year when they have been watering up on Siawappe Creek and feeding on the hillsides, they gradually work up, they would travel then from the creek clear to the top of the ridge to where the feed was, if they had eaten the feed off below, then come back to the creek to water.

The COURT.—That is all.

Mr. PLATT.—(Q.) Mr. McClellan, if this line beginning at a point near the end of Nelson's fence, and

(Testimony of E. C. McClellan.)

extending up and around the place on Toejam Mountain, the red line, if that represented a fence, it would prevent the cattle, wouldn't it, from going up and going across Toejam Mountain, to that extent?

Mr. DENMAN.—To what extent?

Mr. PLATT.—To the extent that the fence would be an obstruction.

A. Of course they would not cross the fence.

Q. They could not get into certain sections of Toejam Mountain, which you testified were passable, could they?

A. Not so far as the fence was concerned, no.

Q. In other words, your testimony, as I understand it, was based on the natural trend of cattle, in the event there were no obstructions in their way?

A. Yes.

Q. But you did not testify regarding any possible fences that were built to prevent the cattle going up that way?

A. No, because of my personal knowledge I don't know of the fences being there.

Mr. PLATT.—I want to make your testimony clear.

Mr. DENMAN.—Now to make it clearer: Presume this red fence extending from Nelson's black fence in 9, of township 39 north, [223] range 49 east, from 9 into 8 and 5, from 4, and then running up to the point of the arrow, the easterly point of the arrow, and then running easterly to Toejam Mountain, suppose that fence were there, would that in any way interfere with the general route of cattle moving from

(Testimony of E. C. McClellan.)

the south in this Government land here into this Toejam country beyond?

A. Well, I have got to have a little enlightenment about what you have got down there as the Toejam Mountain. The ridge that lays between Toejam Creek and Siawappe Creek, I suppose this is supposed to be Siawappe Creek, that ridge extends easterly and westerly; a fence line running along the township line on the north line of 4 and 3, would naturally strike the top of that ridge, it would continue along the side of the ridge a short distance above the north of the creek, if that is Siawappe Creek, I don't know, not having my own plats here, I don't know whether that is intended to be Siawappe Creek or not.

Q. As I understand it, you make this thing called Toejam Mountain a ridge, and Toejam Mountain itself, 4 miles to the east?

A. There is no Toejam Mountain I know of. This Toejam ridge might be called the mountain; the mountain itself is several miles to the east. I really cannot tell you the name of that mountain unless it is Independence; Mount Blitzen is on a part of the ranch just west of Tuscarora Valley.

Q. Take this space here, Opening No. 5, marked by the arrow, and through that space and running up what is called Toejam Mountain towards the easterly, would cattle have any difficulty moving over the Government land through that opening? A. No, sir.

[224]

Mr. DENMAN.—That is all.

(Testimony of J. W. Melrose.)

Mr. PLATT.—That is all.

(Court adjourns until Friday, March 8th, 1912, at 10 A. M.)

Friday, March 8th, 1912, 10 A. M.

[**Testimony of J. W. Melrose, for the Plaintiff.**]

J. W. MELROSE, called as a witness by plaintiff, having been sworn, testified as follows:

Direct Examination.

(By Mr. PLATT.)

Q. State your full name, Mr. Melrose.

A. James W.

Q. Where do you live?

A. My home is in Denver, Colorado.

Q. What is your occupation, profession or business?

A. At the present time I am a Government employee.

Q. In what capacity?

A. Special Agent of the Department of Justice.

Q. State what your employment was prior to that time. [225]

A. In various engagements, farming and stock-raising chiefly.

Q. For how long were you engaged in the business of farming and stock-raising?

A. I was raised on a farm and been in the business ever since.

Q. Have you ever occupied any other official position with the Government?

A. I have been a forest ranger.

(Testimony of J. W. Melrose.)

Q. During what period of time?

A. 1905, 1906, and a portion of 1907.

Q. And how long have you been engaged with the Department of Justice as a special agent?

A. Since July, 1907.

Q. From that time up to the present continuously?

A. Yes, sir.

Q. Are you acquainted with the land known as the Squaw Valley Ranch of the Golconda Cattle Company, situated in Elko County?

A. I spent two days in going over the land, the only time I have ever been over it.

Q. I call your attention to the plat upon the blackboard, Government's Exhibit No. 1, and will ask you to examine it and state whether or not that is the land to which you refer. A. Yes, sir, that is the land.

Q. What is the general condition as to character of the land represented in the white within the so-called inclosure?

Mr. DENMAN.—Object to the question; it is not shown that he ever was on that land; he has been in that direction, but as to his presence on this area of Government land, I am quite certain that he was not there, and there is no testimony that he was.

Mr. PLATT.—I understood that he testified he spent two days going about the land.

Mr. DENMAN.—Yes, but what land?

The COURT.—(Q.) Were you ever on this land in question? A. Yes, sir. [226]

Mr. DENMAN.—(Q.) The interior of it?

A. No, sir.

(Testimony of J. W. Melrose.)

Mr. DENMAN.—That is what I thought.

Mr. PLATT.—(Q.) How close to the interior land were you?

A. Well, I could not say that I was back over a mile from the deeded land represented on that map, or patented lands.

Q. Were you able from where you were to observe the general character of those lands?

A. I think so.

Q. What was the general character?

A. Why, it is very open land that you can see a large portion of it from many different views or positions that I was on, and following the fence line and hill tops.

Q. From your experience in farming, cattle-raising and stock-raising, what would you estimate the yearly rental of the land represented in the white within the inclosure to be reasonably worth?

Mr. LEWERS.—To which we object, first, on the same general grounds that we interposed to a similar question propounded to the witness Flocker, which question was withdrawn; and secondly, upon the ground that no foundation has been laid, showing the familiarity of this witness with rental values in this country.

Mr. DENMAN.—And on the further ground, if this be for the purpose of giving evidence on an accounting, that the Court has entered no interlocutory order for an accounting; we have not reached that portion of the litigation.

The COURT.—I am inclined to think it would be

(Testimony of J. W. Melrose.)

better to defer this examination until I decide whether this is an unlawful inclosure or not, and then to refer the matter to an expert. My engagements are such, I feel I must leave here, or at least close the hearing of this case by next Friday evening, and I am inclined to think it would be better to defer this, and refer the matter to a Master to take the testimony and make the findings. [227]

Mr. PLATT.—We will defer to your Honor's wishes in that regard, if the Court please.

The COURT.—If the matter were one of less importance, and between individuals, and it could be done, I would feel as though I ought to take the matter up now in order to save expense, but from the way witnesses have been subpoenaed, I don't think the question of expense counts very much with either party.

Mr. PLATT.—I will state, if the Court please, the reason the Government is attempting at this time to show values in the nature of joining issue by testimony for an accounting, is that by and through a stipulation entered into between counsel, and upon which stipulation, as I understand it, an order of the Court was made, this case was ordered to be tried orally before the Court, and the purpose of securing that stipulation and order, as I understand it, in fact it was the Government's purpose, to obviate the necessity of referring anything to a Master, and permitting the entire issues involved in the case to be presented orally in open court before the Court. I make that explanation in order that your Honor will

(Testimony of J. W. Melrose.)

be advised as to why the Government is attempting at this time to show the value of these lands before the Court orally on the trial.

Mr. DENMAN.—There has been no stipulation that there could be an accounting before there is an interlocutory order for an accounting.

Mr. LEWERS.—We do not understand it that way.

Mr. PLATT.—I am explaining my position, if the Court please.

The COURT.—I think it would be unfortunate if I have to continue the hearing of this case, the main issue, very unfortunate, so I think we had better postpone that testimony. If we have time, and you both wish me to hear that testimony, if you conclude [228] this case in two or three days so I can hear that before I go to San Francisco, I will hear it; but I want to get through with this main issue before I go away.

Mr. PLATT.—You may cross-examine.

Cross-examination.

Mr. DENMAN.—(Q.) As a matter of fact, Mr. Melrose, what you did in that country was to follow the fence? A. Yes, sir.

Q. And that was all, wasn't it? A. Yes.

Q. You went around there with Harry Petrie, didn't you? A. Yes, sir.

Q. And also with Mr. Flocker? A. Yes, sir.

Q. That is the only time you have been in there?

A. That is the only time.

Q. And that was when? A. July, 1911.

(Testimony of J. W. Melrose.)

Q. And all that you saw of that interior land was what you could see of it from the fences as you rode?

A. Yes, sir; and I made some trips across high points a-foot, that would give me different views of the land.

Q. You went up and looked at that natural barrier, up in the northeast corner, didn't you?

A. Well, at a distance, yes, sir.

Q. I mean the thing that is called a barrier on this map, right here, or Toejam Mountain, you went up and looked at that, didn't you?

A. I didn't go up there, it was in plain view from the country I was in; I wasn't up, plumb up to the country it was in or placed on the map at all.

Q. And as you came across, you came across from what is called North's fence here, and came down to Nelson's fence on the other side, and then came down here? A. Yes, sir. [229]

Q. And you saw all that country in there?

A. Yes, sir.

Q. And as you came through there you had some discussion as to whether or not this was a barrier, didn't you?

Mr. PLATT.—Object on the ground it is improper cross-examination.

Mr. DENMAN.—Withdraw the question.

The COURT.—Objection sustained.

Mr. DENMAN.—(Q.) And then you came on down, followed the fence around, right around the line of fence, clear back along Willow Creek?

A. Yes, sir.

(Testimony of J. W. Melrose.)

Q. Through the open lane here? A. Yes, sir.

Q. Across through this road? A. Yes, sir.

Q. Back to what is called Opening No. 1?

A. Yes.

Q. That is all you know about this land in here, is what you saw from riding around the ranch?

A. Yes, sir.

Q. How long did it take you to make this round?

A. We covered the ground in a half a day, we doubled up onto this Willow Creek, I think they term it, 6 or 7 miles from the Home Ranch or Dutton's Ranch, covered that portion of the ranch very carefully the first half day we was out; and the next day we completed the circle, coming in over some of the same ground we had covered the day before.

Q. And you say you saw the land from this end here; how much time did you spend up between North's fence and Nelson's fence?

Mr. PLATT.—I object on the ground it is improper cross-examination.

Mr. DENMAN.—He has testified as to the character of this country.

Mr. PLATT.—All of these questions asked were preliminary questions, looking to his knowledge as a stockman to qualify him to [230] testify as to the value of the lands upon the interior; and also as to whether he saw the lands and became acquainted with them, with that purpose and end in view; and the questions themselves manifestly show they were merely preliminary questions looking toward testimony upon valuations of those lands. If they de-

(Testimony of J. W. Melrose.)

sire, if the Court please, they have the privilege of making this witness their own witness, and bringing out any additional information he might have, and which the Court considers proper.

Mr. DENMAN.—The point is, you asked me to cross-examine upon your own examination; it was your own suggestion.

Mr. PLATT.—When I turn a witness over for cross-examination it means cross-examination, and does not mean cross-examination on anything not material.

Mr. DENMAN.—Your direct examination brought forth the statement that he had passed through this country; I am trying on cross-examination to show how long he was between North's fence and Nelson's fence, in passing through.

The COURT.—I will sustain the objection that it is not proper cross-examination.

Mr. LEWERS.—Might I make a suggestion, before your Honor makes a final ruling; from another angle of this proposition which tends to show it is cross-examination?

The COURT.—Well, you may argue, but the rule is fixed now, and it will remain so. You can make him your witness, if you wish to.

Mr. LEWERS.—The suggestion I desired to make was merely this: I don't think we are called upon to make him our witness, when we are entitled to ascertain why he went there, and what he went there for, and if the Government fails to bring out from the witness whom they have called, who is here pres-

(Testimony of J. W. Melrose.)

ent, and was on the [231] ground, certain things which are essential to their case, testified to by another man who was present at the same time, we are not bound by that, but we are entitled to any inference that may be drawn from their failure to do so, and on cross-examination, for the purpose of laying a foundation for that inference, which inference is based on a recent holding of our own Supreme Court, we are entitled to show just where he went and what he did.

The COURT.—I shall sustain the ruling on the ground it is taking up time. This witness has simply gone on the stand and testified with a view of qualifying him to state what the value of the interior of that land was. He said he was there where he could see it, and he went around so that he could see it. Now to go through and question him as to everything he saw, and what he said to people to whom he talked, does not seem to me to be within the limits of cross-examination. You may put this witness on as your witness in chief, but the objection will be sustained, and you will be allowed an exception.

Mr. LEWERS.—We ask an exception to the ruling of the Court.

The COURT.—It will be granted. I want to get through with this case as soon as possible. It is not with a view of shutting out any testimony; but you have a right to put that in on your direct examination, and it don't seem to me to be within the limits of strict cross-examination.

Mr. LEWERS.—I desire to add to the exception,

(Testimony of J. W. Melrose.)

so our position may be clear, that if the witness is called as our witness, we will be unable to lay any foundation to show prior statements made by the witness.

Mr. DENMAN.—(Q.) Now, Mr. Melrose, you have testified that this was rolling land? A. Yes.

Q. And by that you refer to this Government land lying in the [232] middle of the map here?

A. Yes, sir.

Q. Did you see this level rolling land in here as you looked back from the space between North's fence and Nelson's fence?

Mr. PLATT.—I object, if the Court please, on the same ground.

Mr. DENMAN.—I think that is proper cross-examination, the testimony is in.

The COURT.—I will allow that question to be answered yes or no.

A. Portions of it.

Mr. DENMAN.—(Q.) Now did you look at that land in there from this space between North's fence and Nelson's fence?

A. Well, I walked across that distance there, probably 3 miles, it *taken* me an hour or an hour and a half.

Q. Who was with you when you walked across there?

A. No one; well, a portion of the time there was, a portion of it I walked alone, and then was joined by Mr. Flocker.

Mr. DENMAN.—That is all.

Mr. PLATT.—That is all. [233]

[Testimony of Ray Haws, for the Plaintiff.]

RAY HAWS, called as a witness by plaintiff, having been sworn, testified as follows:

Direct Examination.

(By Mr. PLATT.)

Q. State your full name, please. A. Ray Haws.

Q. Where do you live? A. Elko.

Q. How long have you lived there?

A. I have lived there nearly six years.

Q. What is your business or occupation?

A. Well, at the present time it is general work; we did have a livery stable there.

Q. How long were you in the livery business, just approximately? A. About 3 years and a half.

Q. Are you acquainted with what is known as the Squaw Valley property of the Golconda Cattle Company? A. Yes, sir.

Q. I wish you would step to the plat here at the blackboard, marked Government's Exhibit No. 1, and examine it, and state whether you can testify or not that you are familiar with the land represented upon that plat. I call your attention, in order to assist you, that you will notice some natural landmarks, Willow Creek, Rock Creek, Toejam Mountain, Nelson's fence and North's fence. Do I understand you to testify that you are familiar with that section of country as represented upon the map?

A. Yes, sir.

Q. State how you familiarized yourself with that country, how many visits you made upon that land?

A. Riding there.

(Testimony of Ray Haws.)

Q. Riding there? A. Yes, sir.

Q. How frequently have you ridden there?

A. Well, several different times.

Q. And what was your position while you were riding there, what were you doing?

A. Owned horses. [234]

Q. Do you remember when you last visited the land? A. Yes, sir.

Q. When was that?

A. That was 2 years ago, 2 years ago in the fall.

Q. You don't remember about what month, do you? A. It was in September.

Q. 1910? A. Yes, sir.

Q. And who, if anyone, was with you?

A. Mr. Flocker and Mr. Gray.

Q. State whether or not—if I may be permitted to ask a leading question, it may be objected to, don't answer the question until counsel have an opportunity to object—but state whether or not upon this last visit, or at any other visit, you observed any cattle, horses, or sheep grazing within the land represented in white to which I am pointing, and assumedly being Government land?

A. I don't just understand your question.

Q. It has been admitted in testimony that the land here in the white upon the plat is Government land, I will ask you whether upon any of your visits you ever noticed any cattle or sheep or stock of any kind grazing or being herded upon those lands?

A. At all times.

Q. At all times? A. Yes, sir.

(Testimony of Ray Haws.)

Mr. DENMAN.—One moment. The admission regarding white lands, it is only those lands between the creeks, not outside of the creeks.

Mr. PLATT.—I am only talking about the inclosure, that must be manifest, and I pointed to it, and ran my hand over it.

Q. Then as I understand it, you noticed this stock grazing upon these lands in 1910, more particularly in September, when you made your last visit accompanying Mr. Flocker and Mr. Gray? [235]

A. No more particularly than I had before; I always noticed them there, they always had been there.

Q. Do you know whose cattle, stock or sheep they were? A. No, sir, I don't.

Q. You don't know that?

A. No, sir; they were everyone's, belonged to everybody.

Q. Do you know whether they did or not?

A. Yes, sir.

Q. How close were you to them?

A. Well, we used to have them in the corral.

Q. Oh, in the corrals?

A. We used to catch the horses there and corral them.

Q. When did you use to do that?

A. It was two years before that, that was the last time when I was there.

Q. Two years before that? A. Yes, sir.

Q. Then, as I understand it, two years before September, 1910, you used to see everybody's cattle,

(Testimony of Ray Haws.)

sheep and horses, as you say upon this land indicated in the white?

Mr. DENMAN.—Object to that as not what the witness said. What the witness said was two years ago he saw everybody's cattle in there, and two years before that, he saw his own horses in there.

Mr. PLATT.—I don't think that is his testimony.

The COURT.—Well, let the witness tell again.

WITNESS.—Well, I understood that he meant it that way, if I had seen them there all the time.

Mr. PLATT.—(Q.) State whether or not you saw everybody's horses, cattle and sheep within that inclosure at the time you made the visit with Mr. Flocker and Mr. Gray.

A. No, sir, I did not; I didn't see everybody's.

Q. Whose cattle, horses and sheep did you see in there when you [236] made the visit with Mr. Flocker and Mr. Gray?

A. I don't know whose they were.

Q. You don't know whose they were?

A. No, sir, not at that visit there, not at that time.

Q. Did you ever make an additional visit after that time? A. No, sir.

Q. State, if you remember, about how many horses, cattle and sheep you noticed when you were there with Mr. Flocker and Mr. Gray.

A. I don't remember.

Q. Can you give any approximate idea?

A. If I remember right, there wasn't very many.

Q. Were not very many? A. No, sir.

Q. How many visits did you make to this property

(Testimony of Ray Haws.)

prior to the last visit that you made with Mr. Flocker and Mr. Gray? A. To that place, you mean?

Q. Yes.

A. I was there, I guess, six or seven times.

Q. Six or seven times?

A. That is to stop right close there and walk out there.

Q. Do you know when the fence represented on the plat in the black line to which I am pointing, namely, upon the western section of the plat, when that fence was built?

Mr. DENMAN.—Of your own knowledge.

A. On the west side?

Mr. PLATT.—Yes.

A. No, I don't.

Q. You do not? A. No.

Q. State whether or not, if you have the knowledge, if before the fences were built you noticed more cattle and sheep and horses upon the land indicated within the inclosure in the white than you did after the fences were built.

Mr. DENMAN.—Object to the question as leading.

Mr. PLATT.—Well, it is leading, if the Court please, but I am [237] desirous of expediting the examination.

The COURT.—I will sustain the objection.

Q. How many horses, cattle and sheep, if you remember, and belonging to what people, did you observe upon the lands represented on the plat within the inclosure, before the fences were up, and the fences built as they are shown upon the plat?

Mr. DENMAN.—Object to the question as being

(Testimony of Ray Haws.)

indefinite; it may be over a period of ten years, and can have no relevancy as to the total number he saw at any time.

Mr. PLATT.—Well, at any one year, I will amend the question to that extent.

A. In the spring of the year, be from ten to fifteen thousand head of sheep in there.

The COURT.—(Q.) When was that?

A. That was from 8 or 10 years ago; we were down there regularly for 4 or 5 years, go down every spring; every spring they were in there, lambing in there.

Mr. PLATT.—(Q.) Now do you know from which direction those sheep came, and were grazed and herded? A. No, I don't know.

Q. You don't know that? A. No.

Q. Now, how many head of stock, cattle, or sheep did you observe after the fences were up?

Mr. DENMAN.—What fences do you refer to?

Mr. PLATT.—Well, the fences around this plat. If the Court please, it seems to me those are trifling objections; I have been drawing his attention to the fences on the plat.

Mr. DENMAN.—It has not been shown that he knew when the fences were up, or what fences counsel is referring to. There are several fences here. It is a vague, indefinite and general question. We are entitled to know for the purpose of cross-examination on direct examination, what fences are referred to in the question. [238]

Mr. PLATT.—The previous question, which the

(Testimony of Ray Haws.)

witness just answered, was directed in the same manner to this inclosure and these fences, and there was no objection by counsel. The question was how many head of stock, cattle and sheep did you ever notice within that inclosure before these fences were up; there was no objection, and the witness said 15 or 20 thousand sheep; now I ask how many head of stock, cattle, or sheep did you observe within this inclosure after the fences were up?

The COURT.—Could you confine that to a particular year? That would be more definite.

Mr. PLATT.—(Q.) As I understand it, you testified you saw 15 or 20 thousand sheep in there 8 or 10 years ago?

A. That was the first time I was there, and from then on.

Q. And from then on up to what time?

A. Up to 1908, I believe was the last time I was there.

Mr. DENMAN.—(Q.) That was the last time you were there, was it? A. Yes, sir.

Mr. PLATT.—(Q.) Then you never made any other visit there from 1908, until you made the visit with Mr. Flocker in 1910?

A. Only to go through there.

Q. Only to go through there; but up to the year 1908, you saw each year, as I understand it, about 15 or 20 thousand sheep lambing within that inclosure, so-called? A. Yes, sir.

Q. And after 1908 how many times did you go through that inclosure; and I use the term advisedly

(Testimony of Ray Haws.)

in order that I may expedite my questioning?

A. Well, 4 or 5 different times.

Q. What seasons of the year did you go through subsequent to that time?

A. I could not say, I don't remember when it was.

Q. Well, did you go through several times during each year?

A. Well, I believe I made a couple of trips one year, a couple the next, and so on that way; I could not say when it was. [239]

Mr. DENMAN.—(Q.) On the county road?

A. Yes, sir.

Mr. PLATT.—(Q.) As I understand it, after 1908, you did not observe these large number of sheep, 15 or 20 thousand sheep, lambing or crossing within that inclosure?

A. No, sir, not from the county road I didn't.

Q. Not from the county road? A. No, sir.

Q. You went right along the county road, did you?

A. Yes, sir, I never left it.

Q. And you did not observe any of those sheep lambing or grazing there after 1908? A. No, sir.

Q. Do you know whose sheep grazed and lambled within that inclosure during the year 1908, and prior thereto?

A. I was satisfied that they belonged to—

Mr. DENMAN.—One moment. You were told?

Mr. PLATT.—(Q.) Well, I asked you if you know?

A. By the herders.

(Testimony of Ray Haws.)

The COURT.—(Q.) You don't know of your own knowledge? A. No, sir.

Mr. PLATT.—(Q.) Did you know the herders?

A. Yes, sir.

Q. The information that you have upon that is what the herders told you, is that right?

A. Yes, sir.

Q. Did you see any of the iron marks or brands upon the sheep? A. Yes, sir.

Q. Did you know whose iron marks or brands they were? A. Yes, sir.

Q. Whose were they?

A. They were Pitchfork sheep, a lot of them.

Q. What were Pitchfork sheep?

A. They belong to the Golconda Land and Cattle Company.

Q. And those sheep belonging to the Golconda Cattle Company were grazing each year, for a number of years, up to 1908, upon the [240] lands represented in the white? A. Yes, sir.

Mr. DENMAN.—Please don't lead him, Mr. Platt.

Mr. PLATT.—I am simply repeating. (Q.) How many times, Mr. Haws, did you observe sheep grazing within this inclosure, bearing the branding mark or iron "Pitchfork" or symbolic of that?

A. Every time I was there in those years that I used to ride in there.

Q. Now, did you ever notice any sheep, cattle, stock or horses belonging to other people grazing or within that inclosure, prior to the year 1908, and up to that year? A. Yes, sir.

(Testimony of Ray Haws.)

Q. Did you see the brands or iron mark upon the cattle, sheep, or horses, that you noticed?

A. Yes, sir.

Q. And do you know what they were?

A. Yes, sir.

Q. Did you know the branding marks?

A. Yes, sir.

Q. And what they represented? A. Yes, sir.

Q. Well, to whom did the stock, cattle, or sheep belong? A. There was lots of "25" cattle in there.

Q. Who owns the "25" cattle? A. Russell.

Q. What other cattle were there?

A. Two bar circle.

Q. Who owns the two bar circle?

A. Noble owns them, or did own them at that time.

Q. Did you notice any other cattle in there?

A. Yes, sir.

Q. Whose were they? A. Pitchfork cattle.

Q. Is that all? A. "T. S." cattle.

Q. To whom did they belong?

A. Belonged to the Dunphy Estate.

Q. What other cattle?

A. "Rolling-pin" cattle.

Q. To whom did they belong? A. Fairchild.

Q. Anybody else's?

A. A few of mine strayed down in there.

Q. Now, state, if you can, over what part or portions of this land represented in the white they grazed?

A. They grazed over the whole thing. [241]

Q. Over the whole thing? A. Yes, sir.

(Testimony of Ray Haws.)

The COURT.—(Q.) Does this refer to the time before 1908, that you saw these cattle?

A. Yes, sir.

Mr. PLATT.—(Q.) Do you recall, Mr. Haws, from what direction the cattle, sheep, or horses which you just testified you saw grazing upon these lands came?

Mr. DENMAN.—He testified that he did not know.

A. I know which way a lot of the cattle came from.

Mr. PLATT.—(Q.) Which way did they come from?

A. Well, the cattle came from the Humboldt side, the south side, a lot of the cattle.

Q. Could you indicate upon the plat just about where they came from?

A. They came up from along here, Willow Creek (indicates on plat).

Q. If you will, indicate upon the plat about where you know they started from. You say up in this direction, that is a little bit vague.

A. From the Humboldt River.

Q. Where is the Humboldt River relatively to the plat? A. It is south of it.

Q. Can you indicate upon the blackboard about where it is?

Mr. LEWERS.—It is over 50 miles.

A. Yes, it is a long way.

Mr. PLATT.—(Q.) I just want the relative direction, that is all. Well, did you ever see the cattle going up from the south?

(Testimony of Ray Haws.)

A. I saw them working them up in the spring of the year.

Q. How close to this fence did you see them working them up?

A. I saw them working right up Willow Creek.

Q. And where did they begin to start working up Willow Creek, as you noticed?

A. They came in about here (indicates), from below here a ways, and then from there run clear on up. [242]

The COURT.—That is very indefinite, Mr. Platt.

Mr. PLATT.—Yes, I am trying, if the Court please, to direct his attention. They came through from a point—

Mr. DENMAN.—Please don't lead him; you have your finger—

Mr. PLATT.—I am pointing just where he did in order that I may direct his attention to the markings upon the map. Is that where you put your finger (indicates)?

A. Yes.

Q. Am I correct where I put my finger?

A. Yes.

Q. That is where you put yours, was it not?

A. Yes.

Q. There is no question about that, is there?

A. No.

Q. Then you saw the cattle starting from a point upon the plat marked as section 11, township 38 north, range 47 east, and going in a northerly direction towards this inclosure; is that true?

Mr. DENMAN.—I object to the question as lead-

(Testimony of Ray Haws.)

ing. Then you saw the cattle do so and so. Ask him what he saw.

The COURT.—The objection is sustained. It is a leading question, and you had better reform it.

Q. I wish you would point to the plat and tell the Court where you saw the cattle start from, or where you saw them.

A. They were working them right up Willow Creek; this is Willow Creek, is it not?

Q. Yes.

A. They were working them right along up Willow Creek from below here.

Q. Below where?

A. Below this Creek, Ivanhoe, about 4 or 5 miles, or such a matter.

Q. Four or five miles below Ivanhoe Creek?

A. Yes; and from there they worked them right on up the creek, and let them go as they worked them up.

Q. And while they were working them up the creek did you see them graze upon the lands indicated in white? [243]

Mr. DENMAN.—Object to the question as leading. Ask what he saw.

Mr. PLATT.—He so testified. (Q.) State where you saw them grazing.

A. Saw them grazing there.

Q. What do you mean by “there”?

A. On this land here, this plateau between Rock Creek and Willow Creek.

Q. On the plateau between Rock Creek and Willow

(Testimony of Ray Haws.)

Creek, is that true? A. Yes, sir.

Q. How many times have you seen cattle being worked in that direction, in addition to the time that you have mentioned, if at all?

A. Once or twice before that.

Q. Once or twice before that? A. Yes, sir.

Q. Do you know whose cattle they were?

A. They were mostly "25" cattle.

Q. And to whom do they belong? A. Russell.

The COURT.—(Q.) When was that you saw this?

A. That was when I was riding over there.

Q. What year was it?

A. I don't know what year.

Q. About what time?

A. It was about 1906 or 1907.

Mr. PLATT.—(Q.) Now, state whether or not you have seen any cattle, horses, or sheep grazing in that direction since the year 1908.

A. Why, yes, I have seen them grazing in that direction since then; from the road I saw them.

Q. Grazing from the road?

A. Just saw them passing along the road, saw them, that is all.

Q. Passing along the road designated upon the plat as the road beginning at Opening No. 1 and ending at Opening No. 6?

Mr. LEWERS.—No, the road comes out before that.

Mr. PLATT.—Well, Opening No. 7, both on the road.

A. What was the question? [244]

(Testimony of Ray Haws.)

Q. You say you saw them grazing along the road represented upon the plat from Opening No. 1 to Opening No. 7; this dotted line representing the road.

A. Yes, sir, I have; when I have been riding along the road I saw stock along here.

Q. Stock along the road? A. Yes, sir.

Q. Now, whose stock were they, if you know?

A. I don't know.

Q. Were you close enough to see the horses or brands?

A. I was if I had paid any attention, I suppose.

Q. But you didn't pay attention? A. No, sir.

Q. And when did you see them grazing along the road there?

A. When I was travelling back and forth from Gold Circle to Tuscarora.

Q. And you don't know whose cattle they were?

A. No, sir.

Q. State upon what portion of the lands represented upon the plat they were grazing.

A. They were grazing out from the road up along the foothills there along the creek; you could see them scattered all along any time you would go along there.

Q. Scattered along where?

A. Along the foothills from the creek.

Q. Where are the foothills relatively upon the plat, if you can point them out?

A. The creek run in along here, and the foothills would be out here a little ways (indicating).

Mr. DENMAN.—That would be the upper edge of blue line?

(Testimony of Ray Haws.)

A. Yes, sir, about that.

Mr. PLATT.—(Q.) And that is where you saw them after 1908?

A. Yes.

Q. That is, at the foothills near the creek?

A. That is as far as you can see to the top of the hill.

Q. That is as far as you can see from the road?

A. Yes, sir. [245]

The COURT.—(Q.) Is that the edge of the creek or the edge of the blue ground?

Mr. PLATT.—As I understand it, the foothills begin at the edge of the blue, don't they?

A. About along there, I would judge; it is not very far from the creek.

Q. That is where you say they fed in 1908, is that true? A. Yes, sir.

Mr. DENMAN.—By that you refer to the foothills along Willow Creek? A. Yes, sir.

Mr. PLATT.—(Q.) State whether or not you ever saw any cattle grazing from the north or northwest along the lands represented by the white.

Mr. DENMAN.—Now, Mr. Platt, I object to that question as leading; first, to the form of the question, and second to the fact that you indicate on the map with your finger the direction you want to show the cattle to have come, and where they go. If you ask what he saw with reference to the cattle moving in that direction, but to point out the whole thing on the map, and have the witness follow your fingers, is hardly a fair thing on direct examination.

(Testimony of Ray Haws.)

Mr. PLATT.—I want to shorten the hearing as much as I can.

The COURT.—Avoid leading questions as much as possible.

Mr. PLATT.—(Q.) State whether or not you ever saw any cattle grazing from the north or northwest, going in a southeasterly direction.

A. I saw them going in all directions there; I never saw no more than just 4 or 5 head in a bunch, grazing along there; I saw lots of them.

Q. When did you see that?

A. Several bunches.

Q. When did you see that?

A. At some time before 1908 when I was in there.

[246]

Q. Before 1908? A. Yes, sir.

Q. Did you see them after 1908?

A. No, sir, I wasn't there after 1908.

Q. Along the road?

A. I wasn't down on that side.

Q. Not on that side? A. No, sir.

Q. But you are positive that before 1908 you saw them graze from the north down in a southeasterly direction? A. Yes, sir.

Mr. DENMAN.—Object to the question as leading. Objection sustained.

Mr. PLATT.—It was simply repeating what he testified to, if the Court please.

Mr. DENMAN.—I understand the answer is stricken out to the last question.

Mr. PLATT.—I do not object.

(Testimony of Ray Haws.)

The COURT.—It may be stricken out.

Mr. PLATT.—(Q.) Upon what lands did you see them graze while they were coming from a north-westerly direction, and going in a southeasterly direction?

A. On those same lands.

Q. What do you mean by the “same lands”?

A. Between Willow Creek and Rock Creek.

Q. Between Willow Creek and Rock Creek?

A. Yes, sir.

Mr. PLATT.—That is all. You may cross-examine.

Cross-examination.

Mr. DENMAN.—(Q.) Now, Mr. Haws, we have had a lot of vague examination about what you saw. When you came into this country you would see a bunch of cattle, say 4 or 5 cattle, where my finger is at No. 7, township 39 north, range 48 east, you would see a bunch of cattle there, would you? A. Yes.

Q. You could not tell when you saw those cattle where they came from; you just saw the cattle there?

[247] A. I saw them there.

Q. Then you saw other cattle along in another place, a little bunch? A. Yes.

Q. You could not tell where they came from?

A. No.

Q. Not unless you drove them in there? A. No.

Q. And all you can say is when you went through you saw little bunches of cattle in different places?

A. They were ranging.

Q. You could not tell as you looked at those

(Testimony of Ray Haws.)

bunches whether the cattle ranged from one direction or another; you simply knew there was a general drift at that time of the year, that was all?

A. Yes.

Q. And how far they came from, or where they drifted from, you could not tell, except as you knew the brands, and knew where they might have come from? A. Yes.

Q. Is it not true cattle drifting through this country, drifting north from the Humboldt country, prefer to follow the creeks?

Mr. PLATT.—Object to the question on the ground it imputes a knowledge of preference to the cow, or sheep, or lamb, to the animal itself, and that certainly cannot be within the knowledge of this witness.

The COURT.—I will allow the question.

Mr. DENMAN.—(Q.) That is a fact, is it not, that the animals in drifting north follow the creek bottoms up?

Mr. PLATT.—I interpose the additional objection; it is calling for the opinion of the witness.

The COURT.—I will allow the question.

Plaintiff excepts.

Mr. DENMAN.—(Q.) That is a fact, is it not?

A. Answer the question?

Q. Yes. A. Yes, sir. [248]

Q. Now, as you come along this road here can you see the Government land over here? I am now speaking of the road from Opening No. 1, running easterly to Tuscarora, can you see the so-called Gov-

(Testimony of Ray Haws.)

ernment land in white to the north of you, from that road, to any extent; is it not true that the hills rise on the north side and cut off your view? A. Yes.

Q. And you cannot see what is going on there?

A. Not on top.

Q. The great bulk of that territory is shut out from your view, as you come along this road, is it not? A. Yes.

Q. So you would not be able to give any opinion at all as to what cattle, sheep, or horses were in this territory since 1908? A. No.

Q. You haven't been in a position where you could see? A. No, sir, I could only see from the road.

Q. And that would only take you a short ways up to these hills that rise out from Willow Creek, possibly half or quarter of a mile from the road towards the north? A. Yes.

Q. That is about all, is it not? A. Yes.

Q. And that is true from Opening No. 1 until you come out away beyond anything on this map?

A. Yes, sir.

Q. Now, you said that the *irons* that you saw grazing in through this country before 1908 were "25"?

A. Yes.

Q. That is Russell, is it not? A. Yes.

Q. As a matter of fact, Russell's general range is over here, is it not?

A. I don't know where it is.

Q. Is it not true that the bulk of Russell's cattle range over to the east of Siawappe?

Mr. PLATT.—I object on the ground the witness

(Testimony of Ray Haws.)

is not qualified to testify as to whether he knows where any particular man's cattle range is. [249]

The COURT.—Ask if he knows, if he knows, he can say.

Mr. DENMAN.—(Q.) Do you know whether or not Russell's cattle have a general range just to the easterly of Siawappe, that that is known as Russell's range in there; do you know? A. Yes.

Q. Russell's range lies to the east of Siawappe Creek, does it not, his general range?

A. No more than it does—to the east of Siawappe Creek?

Q. Yes, east of Siawappe and Willow Creek, Russell's general range is in through here, is it not, the "25" cattle range in there?

A. They range in there, yes.

Q. That is where the bulk of them range, is it not? How long were you in there? How long did you punch in there? A. I was there quite a while.

Q. Don't you know, as a matter of fact, that the Russell ranch and Russell cattle range generally in this direction? A. Yes, they do.

Q. That was the case in 1908, and prior to that time? A. Yes, sir.

Q. And they also range up in through here, through this line of blue, through Opening No. 6, up into the high country back in here (indicating), where they get the summer feed, don't they?

A. Yes, and back the other way over those low hills there.

Q. They range in from this opening here; back into

(Testimony of Ray Haws.)

the low hills? A. Yes.

Q. That is the natural way for them to come, is it not? A. I don't know whether it is or not.

Q. How do you know they range over those low hills? A. I have seen them in there.

Q. And you presume they came from this general direction?

A. I guess they did, that is the way they bring them in there.

Q. In through that opening here? [250]

A. No, not through that opening there.

Q. Oh, there was no opening there at all, no fence there at that time, was there? A. No.

Q. So they brought them in from their range over here, and they ranged across in on this so-called Government land, into the left, is that correct?

A. I don't understand you.

Q. Well, we will have to take that up another way. Now, you say you punched cattle all through that country?

A. Not cattle altogether; horses, mostly.

Q. Tell me if it is not a fact that the range in on the Government land here is a spring range of about two months' time, during which, in the practice of the country for years, that range has fed sheep, and the Government land in there is practically cleaned off by the sheep ranging and lambing in here during the first two or three months in the spring, and after that time there is practically no feed at all in this territory. Is not that known to you and to every cowboy in that country, practically?

(Testimony of Ray Haws.)

Mr. PLATT.—I object to the question on the ground it is improper cross-examination; the witness was not asked a single question in direct examination as to the character of any of this land, not a single question.

Mr. DENMAN.—You asked him when sheep ranged in there.

Mr. PLATT.—I did; when he saw sheep ranging in there, but I never asked him a single question as to the character of the land.

The COURT.—I will allow that question. The condition of the feed there shows something about when the cattle would be there, and why they would be there, and when they would leave.

Mr. PLATT.—I note an exception.

The COURT.—The exception may be noted.

Mr. DENMAN.—Is not that so?

Mr. PLATT.—Do you understand that question?

[251] A. No.

(The reporter reads the question.)

Mr. DENMAN.—I withdraw the question.

The COURT.—And I suppose you withdraw your objection?

Mr. PLATT.—Yes, your Honor, the objection and exception.

Mr. DENMAN.—(Q.) Mr. Haws, you say that there were some 15,000 sheep ranged in that country in lambing time?

A. I judged there is that many, I don't know.